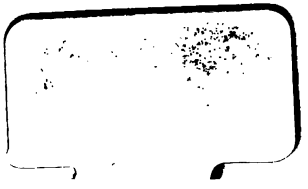

PREFACE

The purpose of the author in writing this book has been to present the law and fact of the automobile insurance cases decided and reported to date in such a manner as to make them readily accessible to those interested in the subject, whether lawyers or laymen. The essential facts of the cases have been stated in detail, and the reasons of the courts for their decisions have been freely quoted from their opinions.

New York, July, 1921. J. S.

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PART I

AUTOMOBILE INSURANCE GENERALLY

CHAPTER I.

Constitution of the Contract

§ 1. **Introductory.**—Part I deals with the general principles of insurance law as these have been applied in automobile insurance cases. Part II deals with matters peculiar to the various kinds of automobile insurance, fire, theft, collision, transportation and indemnity.

§ 2. **Insurable Interest.**—A policy to one who has no interest in the automobile purporting to be insured is void, and an assignment to the owner of an automobile of a policy issued by mistake to a previous owner of the car transfers nothing. O'Neill v. Queen Insurance Co. of America (1918) 230 Mass. 269, 119 N. E. 678; Mowles v. Boston Insurance Co. (1917) 226 Mass. 426, 115 N. E. 666. If an insurance company issues an automobile fire and theft policy to a person who does not own the car and has no insurable interest in it and afterwards, through an agent, agrees orally to substitute in the policy the name of the owner of the car in place of the name of the person to whom it was issued, this gives the owner, in case of loss by theft and subsequent fire, no right to bring an action on the policy, because the policy originally was void and its transfer could give no right; and the oral agreement to substitute the name of the owner was

without consideration and did not create a new and independent contract of insurance. O'Neill v. Queen Insurance Co. of America (1918) 230 Mass. 269, 119 N. E. 678.

§ 3. **Oral Contracts.**—Oral contracts of automobile insurance are legal and binding; Sheridan v. Massachusetts Fire & Marine Ins. Co. (1918) 233 Mass. 479, 124 N. E. 249; Cass v. Lord, (1920)—Mass.—128 N. E. 716; Mowles v. Boston Insurance Co., (1917) 226 Mass. 426, 115 N. E. 666. But to be valid and enforceable the contract must be mutually binding and supported by a consideration. Cass v. Lord (1920)—Mass. —128 N. E. 716; O'Neill v. Queen Insurance Co. of America (1918) 230 Mass. 269, 119 N. E. 678. An agreement by the insurance company's agents to change the name of the insured, assuming they had authority to make the change, was held to be at most only a voluntary undertaking on the part of the insurance company and did not create a new and independent contract of insurance; the agreement, properly construed, plainly contemplated the delivery either of a new policy or the issuance of a rider in connection with the original. O'Neill v. Queen Insurance Co. of America (1918) 230 Mass. 269, 119 N. E. 678. It is the duty of the owner of the automobile, within a reasonable time, to take some steps to ascertain whether the oral contract has ripened into a formal contract of insurance. O'Neill v. Queen Insurance Co. of America (1918) 230 Mass. 269, 119 N. E. 678. In Mowles v. Boston Insurance Co. it was said that "The oral contract to 'cover' means insurance for a reasonable time under all the circumstances * * * it is manifest that a contract to cover cannot extend beyond the time when a policy of insurance is delivered in apparent compliance with the contract." Mowles v. Boston Insurance Co., (1917) 226 Mass. 426, 115 N. E. 666.

§ 4. **Duration of Oral Agreement to Insure.**—A fire policy was issued by mistake in the name of a previous owner of the automobile. The owner called the agent's attention to this; the agent told the owner "not to worry, that it was

covered," took the policy, got an assignment of it to the owner and the assent of the insurance company thereto and some weeks later returned it to the owner, who accepted it. A month later the automobile was destroyed by fire. The owner sued the insurance company, alleging that the company made an oral contract with the plaintiff to issue a valid policy of insurance against fire on the automobile, and that it had failed to issue such a policy. It was not contended that there could be recovery on the policy, because, since the assignor of it had no interest in the automobile on the date of the policy or at any time thereafter, the policy was void and the assignment transferred nothing to the plaintiff. It was held that the owner could not recover upon an oral agreement to insure, because such oral agreement expired when the owner accepted the policy, and also because an agreement to "cover" the owner remains in force only for a reasonable time after the acceptance of the policy, and such reasonable time had expired before the fire. Mowles v. Boston Insurance Co. (1917) 226 Mass. 426, 115 N. E. 666.

§ 5. **Necessity for Acceptance or Approval of Application.** —An application for automobile insurance is not itself a contract, but is merely a proposal, which requires acceptance by the insurance company through someone actually or apparently authorized to accept it, to give it effect as a contract. Where an application for insurance provides that the policy shall take effect on the day the application is approved, if it is not approved, there is no contract of insurance. When, however, such application is approved by the company, the insurance thus applied for and paid for becomes effective, constituting a contract which neither party can change without the consent of the other. The insertion by the company of a restrictive clause in the copy of the application embodied in the policy thereafter issued, without the knowledge and consent of the insured, is held to be a wrongful act, and the insured is justified in repudiating it and in-

sisting upon payment of the insurance in accordance with the agreement. Johnson v. Home Mutual Insurance Co. (1921)—Iowa—181 N. W. 244.

§ 6. **Insured's Knowledge of Loss Before Risk Attaches.**—Where the loss of an automobile, occurring before the risk attaches, is known only to the applicant, a policy subsequently obtained by him without disclosing the fact of loss is void, even though the policy be given a date prior to the loss. Palmer v. Bull Dog Auto Ins. Assn. (1920) 294 Ill. 287, 128 N. E. 499.

§ 7. **Proposal and Counter Offer—Proof of Coverage.**—In order to constitute the contract the minds of the parties must meet on the same proposition. And where an insurer's counter offer to a proposal for insurance embodied in a policy and covering notes sent to brokers, was not accepted by the owner, the owner's payment of a premium would confer no rights, except the right to recover the payment as for money had and received. Where insurance brokers, who had never done business with the insurance company before, sent it a copy of a letter the brokers had written to an automobile owner, stating that his car was covered pending receipt of covering notes from the insurance company, the company was justified in treating the copy sent them as a proposal to take insurance; and since, in view of the requirements of the Oregon standard policy law (Laws 1911, p. 279), it could not be presumed that the insurance company violated the law and assented to the copy of a letter as an insurance contract, a policy and covering note which it sent in reply amounted simply to a counter proposition, which would not give rise to a contract, unless accepted. Cranston v. California Insurance Co. (1919) 94 Or. 369, 185 Pac. 292. Whether there is a meeting of the minds, so as to constitute an agreement to insure may be a question of fact for the jury. Fodor v. National Liberty Ins. Co. of America, (1919) 175 N. Y. Supp. 112.

§ 8. **Agreements to Keep Car Insured.**—An agreement by the seller of an automobile to keep the buyer protected by liability insurance while using a car temporarily furnished him pending delivery of the car ordered is not void as against public policy. The seller of a Waverly electric car took in part payment a Stearns car, the buyer turning over to the seller a liability policy on the Stearns car, and in consideration thereof and of the order for the Waverly, the seller orally agreed to keep in force, to cover the buyer, a policy of liability insurance on a car which was given to him to use until the Waverly was ready for delivery. An accident happened while the buyer was using the temporary car, and a judgment was recovered against him. It was held that he could recover the amount thereof from the seller under the oral agreement to keep him insured. Ford v. Stevens Motor Car Co. (Mo. App. 1920) 220 S. W. 980.

§ 9. **Prior Negotiations.**—The policy is a complete instrument. It cannot be varied or modified by prior negotiations between the insured and the insurance company's general agents, or overcome by invoking the aid of the doctrines of waiver and estoppel based on his interviews at any time with the company's agents after he received and accepted the policy. Preliminary conversations between the insured and the general agents before he ordered a fire policy and conversations after the issuance and before the fire, as well as conversations following the fire, are therefore held rightly excluded in an action on the policy. Cass v. American Central Ins. Co. (1920)—Mass.—128 N. E. 716.

§ 10. **Insured's Failure to Read Policy Immaterial.**—It is of no consequence that an insured did not read a fire policy delivered to him, or the accompanying rider or riders, or "know a single condition in it," but accepted and kept it in his safe until the fire. He is bound by the contract into which he voluntarily entered. Cass v. American Central Ins. Co. (1920)—Mass.—128 N. E. 716.

§ 11. **Renewals—New Car.**—A renewal of a policy is, in effect, a new contract of insurance, being, unless otherwise expressed, on the same terms and conditions as were contained in the original policy. Palmer v. Bull Dog Ins. Assn. (1920) 249 Ill. 287, 128 N. E. 499. Where a theft policy with a mutual insurance company provides that if the insured car is disposed of and another purchased the owner, to insure the new car, must give the company notice and pay a fee "when a contract, to be attached, to the subscriber's certificate, will be issued" if the new automobile is approved by the insurer, the insurance on the new car does not relate back to the time the application was made, and if the new car is stolen before the application is approved there can be no recovery. The owner of an automobile covered by a theft policy containing such a provision sold the car and purchased a new one in June 1917. On August 7, 1917, about 3 o'clock he mailed a request to the insurance company to transfer the policy to the new car. Between 7 and 9 p. m. on the same day the car was stolen. On August 8 the transfer was approved and mailed to the insured. In an action on the policy it was held that there was no liability since the risk could not have attached to the new automobile until the application had been accepted on August 8 and that was after the car had been stolen. Palmer v. Bull Dog Auto Ins. Assn. (1920), 294 Ill. 287, 128 N. E. 499.

CHAPTER II.

Construction of Policy

§ 12. **Where Policy Unambiguous.**—Contracts of automobile insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, the terms are to be taken in their plain and proper sense. McClung (to use Union Casualty Insurance Co.) v. Pennsylvania Taximeter Cab Co., (1916) 25 Pa. Dist. 583; Crowell v. Maryland Motor Car Insurance Co., (1915) 169 N. C. 35. While it is true that insurance contracts should be construed most strongly against the insurer, yet they are subject to the same rules of construction applied to the language of any other contract. It is a fundamental rule that the language of a contract is to be accorded its popular and usual significance. It is not permissible to impute an unusual meaning to language used in a contract of insurance any more than to the language of any other contract. Bell v. American Insurance Co. (1921)—Wis.—181 N. W. 733. Where there is no ambiguity in the terms of an insurance contract, neither party can be favored in its construction, and if the stipulations are such as the parties might lawfully make, it is the duty of the court to enforce them. Dimmick v. Aetna Insurance Co. (1919) 213 Ill. App. 467; Wampler v. British Empire Underwriters Agency (1920) 54 Dominion L. R. 657.

A clause in a fire policy in favor of a dealer, declaring the policy "to attach and cover upon automobiles, chassis, tops or other equipment, while attached to and a part of automobiles owned by the assured and held by him for sale," until the time of delivery to the purchaser, is not ambiguous and open to explanation, and it is not necessary, therefore, that the understanding of the parties as to the character of the property actually covered or to be covered should be passed upon by the jury in an action on the policy. The words are to receive their ordinary meaning; and the automobiles could not be classified thereunder as comprising "new cars, second-hand cars and junk cars," some of which it was mutually understood the plaintiff did not intend to insure. Cass v. American Ins. Co. (1920)—Mass.—128 N. E. 716.

§ 13. **Question of Ambiguity Remains for Court of Appeals.**—If the terms of the policy are unambiguous, its construction is a question of law for the court. This question, the New York Court of Appeals holds, survives the unanimous decision of the Appellate Division and is subject to review by the Court of Appeals, which also decides the question as to ambiguity. The court said: "The fact that the courts below have read the policy otherwise and found it susceptible of another meaning is urged as establishing the fact that reasonable and intelligent men may honestly differ as to its meaning, and that it must, therefore, be construed against the insurer. It is, however, for this court to say, as matter of law, whether reasonable men may reasonably differ as to such meaning, or whether the indulgence of the lower courts has not written a new contract for the parties and extended the defendant's liability beyond the plain and unambiguous language of the policy. As a legal proposition, we must first find that the contract is ambiguous, before we may apply the rules governing the construction of ambiguous contracts." Hartigan v. Casualty Co. of America, (1919) 227 N. Y., 175, 124 N. E. 789, reversing 178 App. Div. 942, 165 N. Y. Supp. 894, which affirmed 161 N. Y. Supp. 145.

§ 14. **Construction of Ambiguous Clauses.**—The general rule that a condition in a policy of insurance, being the language of the company, must, if there by any ambiguity in it, be taken most strongly against the company, is followed in the construction of an automobile insurance policy; if reasonably susceptible of two interpretations it is to be construed in favor of the assured, so as not to defeat without plain necessity the claim to indemnity which it was the object to secure. Utterback-Gleason Co. v. Standard Acc. Ins. Co. of Detroit, (1920) 179 N. Y. Supp. 836; Crowell v. Maryland Motor Car Insurance Co. (1915) 169 N. C. 35; Kunkle v. Union Casualty Co. (1916) 62 Pennsylvania Superior Ct. 114. But this rule is not carried to the extent of construing the policy contrary to its manifest intention and express condition. Marmon Chicago Co. v. Heath, (1917) 205 Ill. App. 605.

§ 15. **Practical Construction by Parties.**—In construing a policy resort can only be made to its practical construction by the parties thereto where there is some degree of obscurity or doubt in the language employed. Evidence of the practical construction placed upon the policy by the parties was held admissible where the policy contained a provision which exempted the insurer from liability where the injury occurs while the car mentioned in the policy was "being driven by any person under sixteen years of age," or while such car "is being used for any other purpose than that specified in the schedule." The court said: "The schedule referred to describes the permissible use of the car as being 'for business calls and pleasure.' Does the exemption of the insurer where the driver is under sixteen years of age imply an admitted liability where the driver is a member of the family of the insured over sixteen years of age? Again, the limitation of the use of the car to 'business calls and pleasure' is very general and indefinite, if not elastic, and affords a very appropriate instance for considering the attitude and conduct of the insurer with reference thereto. Are the 'busi-

ness calls' mentioned those strictly personal to the owner, or do they include those of his wife and children and members of his family? Is the use of the car for 'pleasure' a use for *his* pleasure alone, or does it include use by members of his family over sixteen years of age for their pleasure, or for the pleasure of their guests and friends to whom they extend the ordinary courtesies of social life? Again, there is a clause of the policy which provides that when *any* accident happens, the assured shall at once notify the company; and, if 'any claim is made on account of such accident,' like notice shall be given; and 'if any suit is brought to enforce such a claim,' the company, on notice thereof, "shall defend such suit,' etc. The terms 'any accident,' 'any claim,' and 'any suit' are very broad; and although, when construed solely in connection with all the terms of the policy, and without reference to extrinsic circumsances, they could properly be restricted within the narrow limits for which appellant contends, yet such limitations are not so clearly expressed as to exclude all room for construction. In other words, if the language be open to construction at all, we can conceive of no sound reason for not applying the rule as to practical construction of the parties, if there be any evidence showing such fact." Fullerton v. United States Casualty Co., (1918) 184 Iowa 219, 167 N. W. 700.

§ 16. **One Form May Not Be Used to Aid Construction of Another.**—The introduction in evidence of a form of insurance policy sometimes used by the defendant insurance company and which specifically excludes "damage caused by striking any portion of the roadbed or by striking the rails or ties of street, steam, or electric railroads," throws no light on the proper construction of a collision policy which does not contain such an exception, and therefore is held to raise no presumption that the one policy covers anything specifically excluded by the other. Bell v. American Insurance Co., (1921)—Wis.—181 N. W. 733.

§ 17. **Effect of Rider.**—A clause of a rider to a policy may declare that the agreements and stipulations contained in the rider cancel and replace anything to the contrary printed in the policy, and in such case the clauses of the rider will prevail. Cass v. American Central Ins. Co. (1920)—Mass.—128 N. E. 716.

§ 18. **Deductible Clause.**—A provision to the effect that from the amount of each claim when determined the sum of $25 shall be deducted and reciting that "the company shall be liable for loss or damage in excess of that amount only "clearly restricts the indemnity payable to such an amount as appears in excess of $25." Stix v. Travelers' Indemnity Co. of Hartford (1913) 175 Mo. App. 171, 157 S. W. 870.

CHAPTER III.

Reformation and Cancellation.

§ 19. **Reformation of Policy for Mutual Mistake.**—To be entitled to reformation of a policy for mistake, the party asking it must show, not only that the alleged mistake occurred, but also that it was mutual. In other words, it must be made to appear that, by mistake, the contract as written fails to express the mutual intent of the parties; and if the mistake is denied, the fact must be established by a clear and satisfactory preponderance of the evidence. Vague and uncertain statements of the insured of what occurred when the insurance was taken out will not alone establish mutual mistake in the terms of the policy as written; but the circumstances attending the transaction, together with the practical interpretation put upon the policy by both parties may be taken into consideration. In an action seeking reformation of an indemnity policy over a car described in the policy as being "for business and pleasure" so as to cover injuries by the car when driven by a servant or any member of the insured's family, it appeared that after an accident from collision, occurring when an adult but dependent son of the insured was driving, the company took charge of negotiations for settlement and did settle with two of the injured persons. It sought a similar settlement with the third, but failed to reach an agreement on terms; and when such person brought suit against the insured's son, the driver of

the car, it took up the defense, which it subsequently abandoned on the ground that the claim therein was not covered by the policy. It was held that, since the plaintiff believed and acted upon the belief that his policy covered a case of this kind, and the company gave him every reason to understand that such was its own construction of their contract, the insured was entitled to reformation of the policy, if that was necessary to enable him to recover thereon. Fullerton v. United States Casualty Co., (1918) 184 Iowa 219, 167 N. W. 700.

§ 20. **Same.**—An owner wished to insure against damage to his car by direct collision, but, by mistake of himself and the insurance company's local agent, who, under the evidence, had no authority to make a binding contract of insurance, attached the wrong rider, insuring against liability for damage to the property of others by collision. About a month thereafter the insured's car was injured by coming into collision with an obstacle in the road. On claiming for the loss he was informed by the company that it was not covered by the policy. The claim being a small one, the company settled it, its manager explaining to the insured at the time that there was a different rate of premium covering damages to his own machine. "This matter being thus adjusted, Browne (the owner of the car) took no step either to rescind his policy, or to request the company to issue to him a new one which would without question insure him against damage to his automobile through direct collision; and matters remained in that condition when, in September of the same year, while being driven by himself, his automobile came into collision with another vehicle and was damaged to the extent of $1,350. He made claim upon the company for this amount, and was refused payment upon the ground that in the opinion of the company such a loss was not covered by the policy." Browne sued the company on the policy, and for its reformation if that was necessary to entitle him to recovery. The company contended that the

policy issued to Browne was the one he applied for; that it did not cover the loss sought to be covered, and that in any event, after the first accident and its settlement, Browne, by retaining his policy and not offering to pay the additional premium chargeable upon a policy of the kind claimed to have been requested, was in no position to ask for reformation of his policy. Browne contended that it was the intention of the parties by their contract to insure him against damage to his automobile, and that he, having paid the premium demanded by the company, was entitled to have the policy reformed so as to cover such damage; and further, that the company by its action in recognizing and paying the first claim, and not at that time canceling the policy, was estopped to deny that the policy covered the loss sought to be recovered. It was held that the plaintiff was not entitled to reformation of the policy, and that the company was not estoppel to deny that it was liable for the amount claimed. The first claim, which the company settled, "was for a small amount; and nothing was more natural than that the manager of the company, recognizing that the plaintiff had been misled by the company's agent into applying for a policy different from the one he desired, should be willing to make plaintiff whole up to that time without additional charge; but no inference could properly be drawn therefrom that he was willing that such losses should be recognized in the future now that Browne no longer labored under any misapprehension or mistake. The true reason for the plaintiff's inaction suggested by the evidence is rather that he was still of the opinion that his policy covered the character of loss in dispute, and that if the question ever came to be litigated the courts would sustain his view. The circumstances attending the settlement by the company of Browne's first loss are entirely insufficient to constitute an estoppel as against the defendant, nor was such estoppel an issue in the case." Browne v. Commercial Union Assurance Co. (1916) 30 Cal. App. 547, 158 Pac. 765. Where in an action on a

policy for the loss of the insured automobile destroyed in a collision, the only defense was that the provision in the policy against loss or damage by collision had been left in the policy by mutual mistake, and the preponderance of the evidence was in favor of the defendant company's plea, it was held that the question was one for the jury. Drew v. American Automobile Ins. Co. (Tex. Civ. App. 1918) 207 S. W. 547; see also § 30. Limits of Agent's Authority.

21. **Cancellation of Policy—Necessity for Surrender.**—A provision in an automobile insurance policy that the unearned premium shall be returned on the cancellation of the insurance only on the surrender of the policy is a reasonable requirement; and in an action for unearned premiums a nonsuit is held properly entered where the insured has failed to return his policy upon the cancellation of the insurance. A policy provided: "This policy shall be cancelled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation. If this policy shall be cancelled as hereinbefore provided or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate." It was held that the right of an insured to demand the return of the premium is wholly dependent upon the covenants of the policy. Where an insured undertakes to cancel the policy under a covenant such as that above quoted, he has no right to demand a return of the unearned portion of the premium until he has surrendered the policy. This is a reasonable requirement, for if the policy were suffered to remain in the possession of the insured the company would, in case of a loss, be subject to the risk of having it asserted that the negotiations for the cancellation of the policy never had been completed or that some officer of the company had agreed to a revocation of the cancellation and accepted a repayment of the premium. Healy v. Stuyvesant Insurance Co., (1918), 72 Pa. Superior Ct. 168. Where there

was a conflict in the evidence with reference to whether or not there had been, subsequent to the issuance of an automobile policy, a cancellation of the collision features agreed upon by both the insured and the insurer, the question was held, in an action on the policy following a collision, to be one for the jury. Drew v. American Automobile Ins. Co. (1918) Tex. Civ. App. 207 S. W. 547.

§21a. **Notice of Cancellation.**—A fire policy provided that the policy might be canceled on written notice by either party stating when the cancellation should be effective, "notice of cancellation deposited in the United States mail, postage prepaid, to the address of the assured." to be sufficient; a check for the unearned premium, similarly mailed, being sufficient tender thereof. The insurance company sent a registered letter to the insured at his residence, notifying him of cancellation of the policy. The insured was out of town and the letter was returned pursuant to the printed request to return in five days. The insured returned within a month. His automobile was burned within three months, the period for which the postmaster is authorized by the federal statute, Rev. St. §3936 ,to hold ordinary letters if he believes they can be delivered. In an action on the policy it was held that the notice of cancellation was not sufficient, the company's request to return the letter within five days having lessened the insured's chance of receiving the notice. American Automobile Insurance Co. v. Watts (1914) 12 Ala. App. 518, 67 So. 758.

§ 22. **Waiver of Condition as to Return of Premium.**—In a stipulation in a policy, authorizing cancellation of a policy by the insurance company, on tendering the pro rata unearned premium, the requirement as to tendering the premium is inserted for the benefit of the insured and may be waived by him. In a case where the company failed to pay the unearned premium on the surrender of a policy containing such a cancellation clause (Buckley v. Citizens' Insurance Co., 188 N. Y. 399, 81 N. E. 165) the court said: "The one object for the cancellation clause is to place the policy

in the custody of the insurance company absolutely and unconditionally. If the insured permits this to be done by his voluntary act when the company gives notice of cancellation without receiving from it the unearned premium he assents to cancellation, but can sue for the amount due him." It is immaterial that there is no written notice of cancellation. If the insured, having knowledge of the company's intention to cancel the policy, voluntarily surrenders it unconditionally for that purpose, the policy is cancelled, though the unearned premium is not tendered back. Hancock v. Hartford Fire Insurance Co. (1913) 81 Misc. (N. Y.) 159, 142 N. Y. Supp. 352, affirmed 145 N. Y. Supp. 1126.

§ 23. **Waiver of Cancellation Provisions.**—It is held that the clause of the Ohio statute (Section 9577 Consolidated Code), requiring the insertion in every fire policy of an obligation to cancel it upon the written request of the insured, is limited in its effect to policies governing property in Ohio, and a provision in a contract for insuring automobiles, though entered into in Ohio, waiving the provisions in the policies for cancellation is valid, the automobiles not being located in that state. Automobile Insurance Co. of Hartford, Conn., v. Guaranty Securities Corp. (1917) 240 Fed. 222. The Connecticut standard form of policy, which contains a cancellation clause and must be used under the Connecticut laws, may contain upon separate slips or riders to be attached to the policy provisions adding to or modifying those contained in the policy (Section 3497 Conn. Gen. Stat. 1902). A waiver by agreement of the parties to a contract for the insurance of many automobiles of the provision for cancellation would therefore seem to be good under the Connecticut law. Automobile Insurance Co. of Hartford, Conn., v. Guaranty Securities Corp. (1917), 240 Fed. 222.

A company engaged in the business of financing the retail sale of automobiles by advancing money to the dealers entered into a contract with an insurance company to insure the machines for three years, the contract providing that

the cancellation provisions in the policies should be waived. Before the termination of the contract the finance company sought to repudiate it and enter into a similar arrangement with another insurance company. The first company sought an injunction. It was held that, as the methods of adjustment of the second company might not be the same as those of the first, so that their profits might not be any certain basis of what the first company would have made out of the original contract if it had been allowed to perform it, the first company was entitled to a preliminary injunction to restrain the breach of contract. Automobile Insurance Co. of Hartford, Conn. v. Guaranty Securities Corp. (1917) 240 Fed. 222.

CHAPTER IV

Notice and Proofs of Loss

§24. **Necessity for Notice and Proofs of Loss.**—In the absence of evidence of a waiver by the defendant insurance company of the requirement of the policy as to notice and proofs of loss, lack of compliance with such requirement will preclude recovery on the policy. Gallagher v. American Alliance Insurance Co. of New York (1921)—Ill. App.—

But to have this effect, some of the later cases hold that either the service must be made a condition precedent to the liability of the company, or forfeiture for failure must be provided for by the policy. Zackwik v. Hanover Fire Ins. Co., (1920),—Mo. App.—225 S. W. 135. See also Clark v. London Assur. Corp., (1921),—Nev.—195 Pac. 809.

§25. **Time for Notice and Proofs of Loss.**—A theft policy contained two conditions precedent to the liability of the company. One was that "in the event of loss or damage the assured shall forthwith give notice thereof in writing to this company or the authorized agent who issud this policy;" second, that he "within sixty days thereafter, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said assured, stating the knowledge and belief of the assured as to the time and cause of the loss or damage, the interest of the assured, and of all others in the property." The policy also contained this provision: "It is a condition of this policy that failure on the part of the assured to render such sworn statement of loss to the company within sixty days of the

date of loss (unless such time is extended in writing by the company) shall render such claim null and void."

In an action on the policy the insured contended that the automobile was stolen on October 17, 1919, in Chicago, from in front of a saloon where he had left it during his absence in the saloon for ten minutes, with a friend; that when he came out it had disappeared.

Neither by the statement nor the evidence did it appear that the plaintiff forthwith gave notice of his loss or made proof of claim within the terms and conditions of the provision of the policy making it necessary for him so to do as a condition precedent to his right of recovery. When the plaintiff applied to the defendant for reimbursement for loss under the policy, the defendant denied liability because of the plaintiff's failure to give notice of the theft forthwith, after the loss, and because no proof of claim had ever been made and sent to the defendant company. It was held that under the circumstances the plaintiff was not entitled to recover. The giving of notice forthwith of the loss and making proof of the claim were held conditions precedent to the right to recover under the policy. There is a practical reason for such a provision; for it is common knowledge that quick action after the theft of an automobile may lead to its recovery, and that delays tend to at least materially impair the chance of recovery of the stolen automobile, delays giving the thief an opportunity to so disguise the car as to make identification difficult to say the least. Gallagher v. Alliance Insurance Co. of New York (1921)—Ill. App.—citing Forbes Cartage Co. v. Frankfort Marine, etc. Ins. Co., 195 Ill. App. 75.

§26. **Evidence of Receipt of Proofs by Company.**—It is incumbent on the plaintiff in an action on the policy to prove the furnishing to defendant of a sworn proof of loss, as provided by the terms of the policy. The law does not raise a presumption of the receipt of such proof because of the failure of the insurance company, when sued upon the policy,

to prove that a sworn statement of the loss was furnished the company or that the company expressly waived such proof. Gallagher v. American Alliance Insurance Co. of New York (1921)—Ill. App.—. Evidence of the contents of proofs of loss will not be admitted until evidence of the receipt of the proofs by the company has been introduced. Glaser v. Williamsburg City Fire Ins. Co. (1921)—Ind. App.—125 N. E. 787.

§27. **Waiver of Notice and Proofs of Loss.**—The defense of noncompliance with the policy requirements of notice and proofs of loss may be waived by the subsequent acts of the insurance company's duly authorized representative. Stone v. American Mutual Auto Insurance Co. (1921)—Mich.—181 N. W. 973. Although a policy requires sworn proof of loss it is held that the insured has a right to rely upon the assurance of the company's agent that the insured's written notice of the loss was sufficient, and that no further notice or proof need be given. O'Connor v. Maryland Motor Insurance Co., (1919) 287 Ill. 204, 122 N. E. 489. Where no proof of loss had been filed with the company in accordance with the terms of the policy the trial court permitted the introduction of a statement written by the adjuster of the company summoned by the agent of the company to whom the fire loss had been reported, which the adjuster stated had been written by him in the presence of the plaintiff insured from the story told him by the plaintiff relative to the fire, and was immediately signed by the plaintiff. Dunn v. First National Fire Insurance Co. (1918) 14 Schuylkill (Pa.) Legal Record 389. But the representative must be one duly authorized to do the acts claimed as waiver. An automobile insured against loss or damage by fire was damaged by fire and the local agent of the insurance company inspected it next day, after which he furnished the insured blanks for proof of loss. There was no evidence that the local agent had any authority to make adjustment of the loss, or that any other agent or officer of the insurance company did anything looking to an adjustment of the loss, or that could be construed as a waiver

of proof of loss. It was held there was no waiver of proofs of loss required by law and by the terms of the policy. Glaser v. Williamsburg City Fire Ins. Co. (1921)—Ind. App.—125 N. E. 787. If a defendant insurance company disclaims absolutely that it issued any theft policy of an earlier date than that on which the automobile was stolen, the plaintiff is relieved from the necessity of presenting proofs of loss. Fodor v. National Liberty Ins. Co. of America, (1919) 175 N. Y. Supp. 112. Where the insured under a theft policy, nine days after the disappearance of a conditional vendee with the insured automobile, notified the insurance company of the loss or disappearance of the automobile, and within 60 days from the date of the loss the company denied liability on the ground that the policy did not cover embezzlement or wrongful conversion, the company was held to have waived proofs of loss. Buxton v. International Indemnity Co. (1920)—Cal.—191 Pac. 84.

By entering into an arbitration under an automobile fire policy stipulation therefor within the time allowed for proof of loss, the insurance company was held to waive all question as to the fact and sufficiency of the proof of loss. Union Marine Insurance Co. v. Charlie's Transfer Co. (1914) 186 Ala. 443, 65 So. 78.

Settlement by the insurance company with the mortgagee of an insured automobile insured under the policy for his interest is not a waiver of proofs of loss on the part of the insured owner. Glaser v. Williamsburg City Fire Ins. Co. (1920) Ind. App. 125 N. E. 787.

§ 28. **Question of Waiver for Jury.**—In an action on a theft policy where the plaintiff alleged that the insurance company had waived the condition of the policy as to notice in writing and sworn statement of loss and accepted verbal notice of the total loss as sufficient, it was held that the question of waiver was properly submitted to the jury. More v. Continental Insurance Co., (1915) 169 App. Div. 914, 154 N. Y. Supp. 1134, affirmed 222 N. Y. 607.

CHAPTER V.

Agents, Brokers and Adjusters

§ 29. **Authority of Local Agent.**—In an action to reform an automobile insurance policy the question arose as to the authority of a local agent to bind the company by attaching the wrong rider to the policy. The agent's letter of appointment was in the following terms:

"*Automobile Insurance.*

"On the nomination of special agent, Mr. F. J. H. Manning, you are hereby appointed agent of the Commercial Union Assurance Co. Ltd., for the transaction of automobile insurance in Salinas, subject to such instructions as may be given you from time to time by this office.

"The rate of your commission will be 15 per cent.

"Policies will be written at this office, and will be sent to you promptly upon receipt of application.

"Yours truly,

"E. I. Niebling, Manager."

The agent was supplied by the company with blank forms of application and riders. Acting under his letter of appointment he received applications, forwarded them to the company at its office in San Francisco, which, if the risk applied for was accepted, issued a policy, and sent it to the agent, who delivered it to the insured, collecting the premium therefor.

It was held that the agent, under these facts, had no authority to make a binding contract of insurance; that the general language of the letter appointing him as agent "for the transaction of automobile insurance "was to be construed in connection with the further language of the letter: "Policies will be written at this office," and with the conduct of the parties under it. There was no question in the case of ostensible agency; and the evidence as to what took place between the agent and the plaintiff at the time of the application for the policy clearly showed that the agent was doing nothing more than preparing the plaintiff's application for the purpose of forwarding it to the insurance company. The court said: "The word 'written' in the phrase, 'Policies will be written at this office,' evidently means something more than the mere physical act of filling in the blanks of an insurance policy. Insurance 'written' is insurance contracted for. Consequently the consummation of the contract in controversy was held to be dependent upon its ultimately being written at the general office in San Francisco. There was, therefore, no completed contract of insurance until the policy applied for was written and delivered; and it is settled that the authority to complete contracts primarily differentiates a general agent having power to bind his principal from mere soliciting agents and other intermediaries operating between the insured and the insurer, who have authority only to initiate contracts, and consequently cannot bind their principals by anything they may say or do during the preliminary negotiations." Browne v. Commercial Union Assurance Co. of London (1916) 30 Cal. App. 547.

§ 30. **Limits of Agent's Authority.**—An automobile hiring company obtained from the Wilkerson Insurance Agency, of Vicksburg, a fire policy on a certain car. The risk was originally written by the Firemen's Fund Insurance Co., but that company, for some reason, ordered its agency to cancel the policy. The Wilkerson Agency did not represent any company which would rewrite the risk; so, in accordance

with a custom or understanding between the insurance agents of Vicksburg, it solicited the Flowers Agency, the regular agents of the Hartford Fire Ins. Co., to issue a policy. This was done, and the policy delivered to the Wilkerson Agency and by them to the insured. The policy had Wilkerson's sticker on it. The Wilkerson Agency paid the premium, and by a custom of dealing the two agencies divided the commission. Neither the agencies nor the insured read the policy, which, after the destruction of the car by fire six months later, was discovered to cover the car only while it was in the garage, and did not cover the loss. The insured, in an action for reformation of the policy, claimed that the contract made by them was for a policy exactly like the one canceled, which would have covered the loss.

There was evidence that the insured knew when they received the policy that the Flowers Agency was the Hartford's agents and that the Wilkerson Agency was not; that they knew the policy delivered was the only policy the Hartford would write on the car, and that its agent had no authority to write a policy like that canceled. In other words, the evidence showed that the limitation placed by the Hartford upon its agents was known to the plaintiff when it accepted the Hartford policy. There being no warrant for holding that a principal can be bound by the unauthorized acts of his agent, and known to the party dealing with the agent to be in direct violation of the instructions of the principal, the insured was held not entitled to reformation of the policy. Mississippi Electric Co. v. Hartford Fire Ins. Co. (1913) 105 Miss. 767, 63 So. 231.

§ 31. **Agent for Disclosed Principal.**—The general principle of law applies that where an agent acts within the scope of his authority for a disclosed principal he does not bind himself unless it appears that he expressly agreed to become personally responsible. Cass v. Lord (1920)—Mass.—128 N. E. 716. In an action against insurance agents individually it was alleged in substance that the defendants verbally agreed

to procure and deliver a valid policy of insurance against fire upon automobiles from time to time owned by the plaintiff in his business, or to insure such automobiles as the plaintiff might from time to time own and have in hand in connection with his business as an "automobile dealer," or to procure and deliver to the plaintiff a valid policy of insurance upon automobiles from time to time owned by the plaintiff in his business and in the meantime "to insure such automobiles themselves." The defendants procured from an insurance company and delivered a policy binding the parties according to its terms. Having done so, the plaintiff was forced to take the position that, independently of their principal, they also agreed to become personally liable as indemnitors, and acting solely for themselves to insure his property.

The plaintiff's own uncontradicted statements and admissions of his contractual relations with the defendants were: "I knew that they were general agents and dealt with them as such. I did not expect they were going to insure my car themselves. * * * I relied on such contract they were to get for me from the insurance company." It also appeared that all premiums were paid to the defendants as general agents of the company. This evidence was held insufficient to warrant a finding that the defendants had bound themselves individually, and the plaintiff could not recover from them for a breach of the contract. Cass v. Lord (1920) —Mass.—128 N. E. 717.

§ 32. **Agent for Undisclosed Principal.**—In an action to recover under an automobile insurance policy signed "New Jersey Indemnity Company, Attorney in Fact," and by the terms of which policy "subscribers to Motor Car Underwriters at New Jersey Indemnity Exchange severally agree to indemnify the subscriber named herein," the amount of loss to be ascertained by the subscriber and the attorney in fact, while the policy was regarded by the court as an anomalous one, it was held to be a contract by an agent for

unnamed principals, and the attorney in fact was liable on the policy. Solomon v. New Jersey Indemnity Co. (1920) —N. J. L.—110 Atl. 813.

§ 33. **Broker's Authority to Act for Insurance Company.** —Where brokers, who wrote a firm that their letter would protect the firm from fire or theft over specified cars, the coverings being in a named insurance company, had never acted as agents of the insurance company up to that time or had any business with the company, or had represented to the firm that they had any authority to act for the company, the case was not one of undisclosed principal, and the company was not bound by their letter. Cranston v. California Insurance Co. (1919) 94 Or. 369, 185 Pac. 292. The fact that an insurance broker solicited from the owner of an automobile an application for a fire and theft policy and obtained from an insurance company's agent the policy which was issued did not constitute him the agent of the insurance company, with authority to renew the policy by oral contract. Sheridan v. Massachusetts Fire & Marine Ins. Co. (1918) 233 Mass., 479, 124 N. E. 249.

The sending by the insurance company's agent of a notice of the expiration of a fire and theft policy to the broker who had procured the original policy was not evidence from which it could be found that the insurance company had clothed the broker with authority to bind the company by an oral contract of insurance or by an agreement to insure. And statements by a broker to an owner, after the expiration of his fire and theft policy, that the owner would be held covered were inadmissible to show the broker's agency for the insurance company which had issued the original policy, and could not be binding upon that company. Sheridan v. Massachusetts Fire & Marine Ins. Co., (1918) 233 Mass. 479, 124 N. E. 249.

§ 34. **Adjuster Cannot Delegate Powers.**—An insurance adjuster, to whom the settlement of the amount of loss under an automobile theft policy has been referred by the insur-

ance company, cannot, without express authority from the company, delegate to an impartial and competent third party all his powers as an adjuster and make the company liable for damages not covered by the policy. Consequently it is held that an adjuster for an insurance company of the loss sustained under a policy insuring against loss or damage by theft, robbery or pilferage in excess of $25 has no authority to bind the company by an agreement with the insured that the company will pay for putting the car, which had been in use for two years, and had been damaged before the theft and which was recovered after the theft, into perfect repair. The court said:

"One Church, a member of a firm of insurance adjusters, after looking over the car did not agree with the estimate of damages furnished by the plaintiff's expert. He suggested that the plaintiff take or send his car to the Ford service station in Cambridge, and leave it to the persons there in charge to determine what damage was done and to make the repairs. On the testimony of Church the agreement between them was that the insurance company should pay for putting the car in as good condition as it was in before it was stolen. Although the plaintiff, during his cross-examination, corroborated this, yet there was some evidence for the jury that the adjuster agreed that the company would pay for putting the machine 'into perfect repair.' The assistant superintendent of the Ford service station testified that the plaintiff ordered new parts, and 'wanted the car put in as good condition as new;' and, in substance, that the repairs actually made were due to the wear and tear and old age of the car, not to the damage sustained on account of the theft. Chisholm v. Royal Insurance Co., Ltd., (1917) 225 Mass. 428, 114 N. E. 715. The court said: "Under its contract the defendant insured the plaintiff against the loss or damage due to the theft of his automobile. In the absence of evidence as to the actual authority of the adjuster, it is to be assumed that he had power to bind the company in the ascertainment of what that damage was, and in adjust-

ing the cost of repairing it. See Searle v. Dwelling House Ins. Co. 152 Mass 263. The condition of the automobile, so far as not apparent, could be ascertained by proper examination. It would be obvious that in some particulars this condition could not be due to the recent theft; while some other items of the damage naturally would be attributed to the conduct of the thieves during the three or four hours they had the car. The only question open to dispute would relate to a few items which might or might not be attributed to the conduct of the thieves. Even assuming (the defendant having waived the provision relating to appraisal) that the adjuster had authority to refer this debatable question to the Ford company as an impartial and competent third party, he could not, on the facts disclosed, bind the defendant by an alleged agreement which purported not only to delegate to the third party all his powers as an adjuster, but to make the insurance company liable for damages that plainly were not covered by the policy. Church had authority only to ascertain and adjust the loss sustained by the theft of the automobile; and there is nothing in the record to show that the company ratified his alleged agreement to give the plaintiff a practically new car, or that it waived the provision of the policy limiting its liability to the actual cost of repairing, or, if necessary, replacing the parts damaged or destroyed by the theft."

§ 35. **Broker or Agent as Insured's Agent.**—The well settled rule applies, in cases relating to automobile insurance policies, that where an insurance broker requests insurance from a company which he does not represent he is acting for the insured, who is responsible for misrepresentations in the application made out by the broker. Solomon v. Federal Insurance Co., (1917) 176 Cal. 133, 167 Pac. 859.

In an action against an insurance company the plaintiffs alleged the execution and delivery to them by a firm of insurance brokers of a certificate of insurance in the following terms: "Pending receipt of our covering notes this will serve

to protect you against loss or damage resulting from fire or theft on the following cars in the amount indicated from noon of this date, said coverings being in the California Fire Insurance Company, viz:

"Studebaker Six 17 Series No. 645,718, $970. 100, rate 1.25. * * * (Signed) Hughes & Co."

but that no recovering notes were ever issued.

It was held that on its face the instrument pleaded did not amount to anything except the personal promise of Hughes & Company. It indicated nothing more than that Hughes & Company promised as an insurance broker to procure from the defendant certain insurance in favor of the plaintiffs; containing no language which was binding upon the defendant it could not be given a legal effect to charge the company. Cranston v. California Insurance Co. (1919) 94 Or. 369, 185 Pac. 292.

Under the Washington insurance code, 1915, § 6059-2 et seq., a person, not an appointed agent of an insurance company, who acts in any manner in negotiating contracts of insurance for a party other than himself, is a broker, and acts as agent of the owner, so that his knowledge would not be imputed to the company. In an action on an automobile fire policy, where the defense was misrepresentations as to age, condition and cost, it appeared that the insured procured the insurance through one Fraser, who had no appointment or authority to solicit applications and effect insurance for the defendant company; therefore he was not its agent. He aided in negotiating the contract of insurance with the company; therefore he was a broker under the Washington statute. The fact that he acted as a broker without having complied with the requirements of the act by taking out a license did not render the insurance which he had obtained void or voidable, but merely rendered him personally liable for the penalty provided in the act for having assumed the functions of a broker without obtaining the proper license. There was nothing in the testimony to show that either the

company or the owner was acquainted with the fact that Fraser was not possessed of a proper license, and, he having been selected by the owner, there was no reason why the company should be charged with the responsibility for his conduct. Even conceding Fraser was not a broker, it was held that the owner should be bound by his acts on the theory that he was her agent, and that the trial court should have determined, as a matter of law, that Fraser was either the agent or broker representing the owner, and any knowledge he had or representations he made were the knowledge and representations of the owner. Day v. St. Paul Fire & Marine Ins. Co. 1920)—Wash.—189 Pac. 95.

§ 36. **Adjuster's Authority to Admit Liability.**—When the insurance company was notified of a loss under an automobile fire policy, its adjuster wrote the insured that the company could replace the property destroyed for a stated sum, adding, "As this represents the value of the car destroyed and which value is the maximum of the company's liability, we inclose proof of loss for $750 for execution and return." It was held that this was an admission of liability for the amount stated, but where the insured did not accept that estimate or statement of the loss, the company's admission of liability was not a waiver of its right to an appraisement under the policy. Hart v. Springfield Fire & Marine Insurance Co. (1914) 136 La. 114, 66 So. 558.

Under a policy containing the provision: "This company shall not be held to have waived any provision or condition of this policy, nor of this endorsement, or any forfeiture thereof, by any requirement, act or proceeding on its part relating to the appraisal or to any examination herein provided for," a recent Canadian case holds that no act of an adjuster can be binding on the company to constitute a waiver of a defense that the loss is not covered by the policy. The court said that, irrespective of any provision in the policy on the subject, the power to bind the insurance company by a waiver of the defense that the loss is not covered

by the policy is not a necessary incident to the duties of an adjuster, and it would require some express authority from the insurance company to enable him to waive its rights or to estop it from setting up this defense. The insured, in this case, contended that, whether liable on the policy or not, the insurance company was estopped by the consent and admissions of its adjuster who was sent to investigate and adjust the plaintiff's claim for damage to an automobile which had slipped from a ferryboat into the water while being landed. It was alleged that the adjuster gave certain directions to the repairers as to what was to be done with the car, and otherwise acted towards the plaintiff in a way consistent only with the assumption that the insurers were liable. The adjuster denied these assertions; but, apart from his denial, it was held fairly clear that, when he was despatched by the insurers to investigate the loss, they could not have been aware of the exact nature of the accident. In fact it would be one of his duties to investigate this, as well as to ascertain the amount of the damage and to report. It was held his action constituted no waiver or estoppel of the defendants. Wampler v. British Empire Underwriters Agency (1920) 54 Dominion Law Rep. 657, citing Atlas Assurance Co. v. Brownell (1899) 29 Can. S. C. R. 537, and Commercial Union Assurance Co. v. Margeson (1899) 29 Can. S. C. R. 601.

CHAPTER VI.

Arbitration, Appraisal and Award

§ 37. **Waiver of Appraisal by Denial of Liability.**—Provisions in a policy that no right of action shall exist until after an appraisal, and requiring 60 days to elapse after notice of loss before suit is brought, are waived by the insurance company's statement to the insured, when consulted in an endeavor to adjust the loss, that it will not do anything. Gaffey v. St. Paul Fire & Marine Insurance Co. (1917) 221 N. Y. 113, 116 N. E. 778, reversing 164 App. Div. 381; Gross v. Germania Fire Insurance Co. (1920) 29 Pa. Dist. Ct. 879.

§ 38. **Effect of Award.**—An award made in an arbitration of the loss covered by an automobile fire policy merges the right of action on the policy and the insured is entitled to recover only on the award. Union Marine Insurance Co. v. Charlie's Transfer Co. (1914) 186 Ala. 443, 65 So. 78.

§ 39. **Appraisement Not Barred by Total Loss.**—Where there is no state statute requiring the insurer to pay the full amount of the policy on a car that has been totally destroyed, a total destruction of the car does not render impossible or do away with a provision in the policy for an appraisement, stating separately the sound value and the damage,

and limiting the insurer's liability to the cash value of the machine at the time any loss or damage occurs. Hart v. Springfield Fire & Marine Insurance Co. (1914) 136 La., 66 So. 558.

§ 40. **Effect of Bad Faith of Arbitrators.**—Where abitrators are selected pursuant to the terms of a policy and make an award, the award may be disregarded if the arbitrators are guilty of bad faith, partiality, or misconduct affecting the result of the award. Jones v. Orient Insurance Co. (1914) 184 Mo. App. 402, 1917 S. W. 28.

But unless the evidence clearly establishes that the award was the result of fraud or gross mistake, or to state it in another way, was made by appraisers who were incompetent, interested, or partial, the award must be sustained. Home Insurance Co. v. Walter (1921)—Tex. Civ. App.—230 S. W. 723.

And where the appraisers have proceeded in strict accordance with the submission, they are not competent witnesses, in a subsequent action on the policy for palpable mistake and fraud on the part of the insurer's appraiser, to impeach their own award. Eberhardt v. Federal Insurance Co., (1913), 14 Ga. App. 340, 80 S. E. 856.

§ 41. **Failure of One Appraiser to Sign Award.**—Where an automobile fire policy provided that the award of two appraisers and umpire, or any two of them, in the event of disagreement as to the amount of loss or damage, should determine the amount of the loss, and one appraiser failed to sign the award because, having fully and finally considered the matter with his fellows, he had signified his dissent and absolutely refused to sign, the award signed by one appraiser and the umpire was admissible in evidence in an action on the award. Union Marine Insurance Co. v. Charlie's Transfer Co. (1914) 186 Ala. 433, 65 So. 78.

§ 42. **Effect of Refusal to Arbitrate.**—An insurance company is not liable for statutory penalties under the Louisiana

Act No. 168 of 1908 for withholding the amount of liability admitted by the agent or adjuster of the company, as long as the insured demands the payment of a larger sum and refuses to submit to an appraisement under the terms of the policy. Hart v. Springfield Fire & Marine Insurance Co. (1914) 136 La. 114, 66 So. 558.

§42a. **Proceedings in Appraisement.**—It is not necessary for either party to the submission to have notice of the meeting of the appraisers, or an opportunity to present evidence, where there is no provision in either the policy or in the submission for such notice, or for the parties to have the opportunity to submit evidence upon the questions at issue. Eberhardt v. Federal Insurance Co., (1913,) 14 Ga. App. 340, 80 S. E. 856; Home Insurance Co. v. Walter, (1912) —Tex. Civ. App.—230 S. W. 723.

The fact that the umpire did not participate in the deliberations until after disagreement between the appraisers arose does not affect the validity of the award, in the absence of a requirement in the policy or in the arbitration agreement requiring his continuous participation from the beginning. Home Insurance Co. v. Walter (1921 —Tex. Civ. App.—230 S. W. 723.

§42b. **Sufficiency of Award.**—Under an open policy the insurer had the right either to pay to the insured the actual amount of the loss or to repair the automobile and put it in the same condition it was in before the fire. The parties being unable to agree upon the loss an agreement for appraisement was entered into, to determine "the sound value and damage upon the property." The appraisers made an award determining "the sound value to be: value of the car at present time, $25; value of the car before the fire, $300; and the damage to be, cost of repairs to car, including new parts for body and new body, wind-shield and top, $1,284.30." It was held in an action on the policy, that the words "sound value and damage," as used in the submission, were synomyous with the words "the amount of loss" which, under the

policy, was the question to be determined by the submission. When the value of the machine immediately before the fire was fixed, the difference between these two sums represented the loss which the insured had sustained. The award furnished sufficient data to enable the insurer to exercise its option to repair. It was unambiguous, was in strict accordance with the agreement of submission and was binding upon the parties. Eberhardt v. Federal Insurance Co. (1913) 14 Ga. App. 340, 80 S. E. 856.

CHAPTER VII

Extent of Loss and Option to Repair

§ 43. **Expert Testimony as to Extent of Loss.**—Whether or not an insured automobile damaged in a collision with another automobile was or was not a total loss is a proper subject for expert testimony. Wolff v. Hartford Fire Ins. Co. (1920)—Mo. App.—233 S. W. 810. Where the testimony in an action on a collision policy showed that the insured automobile was very much damaged by the collision the insured was held entitled to a judgment for at least nominal damages although the evidence of his witness as to cost of repairs was excluded because of his failure to qualify as an expert. Wilson Bryant Co. v. Agricultural Ins. Co. of Watertown, (1918) 171 N. Y. Supp. 218.

§ 44. **Cost of Repairs.**—Under a policy providing: "The Corporation shall not in any event be liable under this provision for more than * * *the actual cost of the suitable repair of the property injured," it was held that this language indicated that the contemplation of the parties was that the measure of damages should be the actual cost of repair, and that the trial court properly permitted damages to be shown by proving the cost of the repairs and that they were reasonably worth the amount of the charge. Items in such charges should be specifically objected to at

the trial to permit of the objections being considered on appeal. Lepman v. Employers' Liability Assurance Co. (1912) 170 Ill. App. 379.

An indemnity insurance policy insured against loss by reason of liability imposed by law for the destruction of or injury to the property of others arising from the insured's ownership, maintenance or use of certain automobiles. A clause of the policy provided that "The company's liability * * * is limited to the actual damage or destruction, which shall not be greater than the actual cost of the repair or replacement thereof." One of the insured's automobiles collided with another car and damaged it, under circumstances rendering the insured liable. The insurance company paid the owner of the injured car the amount of the bill for repairs paid by him. Thereafter the owner of the injured car recovered a judgment against the insured for the depreciation in the value of his car caused by the accident over and above the amount paid for repairs. The insured paid this judgment and sued the insurance company to recover the amount so paid, with attorney's fees. The court below gave judgment for the insurance company, but on appeal a majority of the Minnesota Supreme Court held that the limitation clause above quoted does not limit the liability of the insurance company to the actual cost of repairs made, when it appears that they do not and cannot make the car as good as it was before the accident, and that the insured may recover the amount of the judgment paid by him for depreciation in the value of the car, with attorney's fees incurred in defending the suit.

The writer of the opinion, Mr. Justice Bunn, with whom concurred Mr. Chief Justice Brown, took a contrary view, saying: "But for the limitation clause there would be no doubt of the liability of the insurer. Was it intended by the limitation clause to preclude liability when the insured was compelled to pay for injuries that could not be remedied by mechanical repairs? Is this clause so free from am-

biguity that it is necessary to so construe it? To repair an automobile means to restore it to a sound or good state after injury or partial destruction, to restore it to its original condition. 'Replacement' has much the same meaning, but as used would seem to refer to cases where property is destroyed rather than merely damaged, where repairs only will not restore it to its original condition. But there are many articles of property which are never again of the same value after injury and repair. It would be often impossible to restore a damaged article to its original condition by repairing it. It was not possible to make Brown's car as good as it was before it was damaged. But all was done that was possible to this end, without buying him a new car. The members of the court are divided in their opinions as to whether the decision of the trial court is sound. The writer thinks that under the clause providing that the liability of the insurer is limited to the actual value of the property damaged or destroyed, 'which shall not be greater than the actual cost of repair or replacement thereof,' defendant is not liable beyond the amount actually paid by Brown for repairs to his car. A majority of the court thinks that this is too narrow a construction of the language of the limitation clause, that, where there are damages to the property that are not and cannot be fully remedied by repairing it, there is a liability for the full loss, limited, of course, by the money limit specified. We have found no authorities that are helpful, and were cited to none. The view of a majority of the court leads to a reversal." Christison v. St. Paul Fire & Marine Insurance Co. (1917) 138 Minn. 51.

§ 45. **Effect of Offer to Repair.**—By the exercise of the option to repair the automobile, in which the insured is bound to acquiesce, the original contract of the parties is converted into a new one on the part of the insurer to repair the car and restore it to its former condition. The contract to pay the loss is thus superseded by the contract to repair.

The insured no longer has a right of action upon the former; his sole remedy is upon the new contract. Letendre v. Automobile Insurance Co. of Hartford, Conn. (1921)—R. I.—112 Atl. 782.

In a recent Canadian case it is held that an insured against collision cannot succeed in an action on the policy where his car has been damaged by collision where the insurance company makes an offer to repair the damages in accordance with the terms of the policy, giving the company the right to replace or repair the damaged property or pay for it in money. Subsequent to the accident in respect of which damages were claimed the car was examined by an agent of the company, who was of the opinion that the car could be satisfactorily repaired in Montreal, and, on behalf of the company, elected to repair the car there. The insured refused to deliver the car for this purpose on the ground that he feared they would not repair it fully and completely, but expressed willingness to have it sent to the factory of the makers at Detroit. The trial judge held that the position taken by the company was the sound one, and that, the company having exercised its option, the insured was bound to deliver the car, if he desired to avail himself of his rights under the contract, and if, upon the return of the car, he was advised that the contract had not been complied with, he would then have his legal remedy. Also, that the election to repair having been made, a tender to pay in cash, made subsequently, was made without prejudice. Judgment for the company was affirmed by a divided court. Those for dismissing the appeal held that the insured came to his conclusion too soon that the company would not repair the car satisfactorily, and that he was not justified in refusing to allow the company to have the car. Sare v. United States Fidelity & Guaranty Co. (1919) U. S. Sup. Ct., 50 Dominion Law Rep. 573.

An automobile truck insured on a valued policy for $2,500 having been badly damaged by fire, the insurance company

offered to settle the claim for $2,000 or repair the car. The insured accepted the latter offer, provided the repairs were not delayed too long, and the car was taken by the insurance company to have the repairs made. The company did not give the insured any assurance as to the length of time necessary to make the repairs. It merely made an estimate of the time at about four weeks. The insured never made complaint that the work was unreasonably delayed or that the car when repaired was not as good as it was before the fire. Two months after the repair work was commenced the insurance company tendered the car for delivery, free of expense. The insured did not acknowledge the company's letter, but remained silent for upwards of five months, when they commenced action to recover $2,500 under the policy for a total loss of the car. The New York Court of Appeals held the complaint was properly dismissed. The election of the insured to have the car repaired and the insurance company's undertaking to make the repairs within a reasonable time created a contractual relation between the parties which terminated all rights of both parties under the policy contract. Such substituted contract deprived the insurance company of asserting any right or option it had under the policy and deprived the insured under the circumstances of the case of any right to assert a claim under the policy. The only remedy, if any, either party thereafter had was for breach of the new or substituted contract. Gaffey v. St. Paul Fire & Marine Insurance Co. (1917) 221 N. Y. 113.

§ 46. **Time Within Which Offer is Available to Company.** —Under a policy giving the insurance company the option to repair, rebuild or replace the property lost, providing that the company gives notice of its desire to exercise this option within thirty days after the receipt of the sworn statement of loss, the company cannot, after the expiration of the thirty days, insist upon the right to rebuild or replace

the car. Gross v. Germania Fire Insurance Co. (1920) 29 Pa. Superior Ct. 879.

§ 47. **Company's Liability for Delay in Repairs.**—A company which exercises its option to repair is liable for unreasonable delay in making the repairs, and for depreciation through improper care during repairs. If the insurance company, instead of paying the damage caused by fire under the policy, elects, under the terms of the policy, to repair the automobile and return it in as good condition as it was in just prior to the fire, testimony is admissible to show the loss of profits sustained by reason of the repairs to the automobile not being made within a reasonable length of time, and its depreciation in value caused by improper housing. Letendre v. Automobile Insurance Co. of Hartford, Conn. (1921)—R. I.—112 Atl. 782, citing Winston v. Arlington Fire Insurance Co. (1908) 32 App. D. C. 61, 20 L. A. R. (N. S.) 960 16 Ann. Cas. 104.

§ 48. **Evidence as to Repairability.**—One who has been in the automobile salvage business for two years prior to the trial and has had twelve years of experience in the automobile business; who purchased the car in question from the plaintiff insured prior to the trial and junked it for the purpose of selling such parts thereof as had any value; and who testified that he had carefully examined it when he received it to determine its condition, enumerating the parts destroyed or injured, was held sufficiently qualified to testify as an expert on the question of whether or not the automobile in question could be repaired so as to operate properly as an automobile. A witness whose testimony disclosed that he had been engaged in the automobile business for seven years was held sufficiently qualified to testify on the same question. Where two expert witnesses testified that the automobile insured and damaged in a collision could not be repaired so as to operate properly, but admitted, on cross-examination, that each and every injured or destroyed part of the automobile (which parts in fact aggregated but a

small portion of the whole of the automobile) could have been repaired or replaced, it was held that this evidence did not warrant the submission of the case to the jury upon the theory that the automobile was totally destroyed. Wolff v. Hartford Fire Ins. Co. (1920)—Mo. App.—223 S. W. 810. A mechanic was held not to have sufficient knowledge of the cost of repairs to an automobile of the particular make owned by the plaintiff to be able to testify as an expert. Callahan v. London & Lancashire Fire Insurance Co. (1917) 98 Misc. (N. Y.) 589, 163 N. Y. Supp. 322.

CHAPTER VIII.

Representations and Warranties

§ 49. **In General.**—The word "misrepresentations," as used in automobile and other insurance policies, is taken in the same sense as it is ordinarily used by the laity, and it is therefore not a technical term. Webster defines misrepresentation as, "Untrue representation, false or incorrect statements or account;" and misrepresent as "To represent incorrectly * * * to give a false or erroneous representation of, either maliciously, ignorantly or carelessly." Misrepresentation, as used in insurance law, means "a false statement touching matters material to the risk," and it is immaterial whether the misstatement resulted from bad faith or from

accident or ignorance. The burden of proving false representations pleaded by the company, as well as their materiality, is held to be upon the company. Zackwik v. Hanover Fire Ins. Co. (1920)—Mo. App.—225 S. W. 135, citing Smith v. American Automobile Ins. Co., 188 Mis. App. 279, 304, 175 S. W. 113, 115; British & Foreign Marine Insurance Co. v. Cummings (1910) 113 Mod. 350, 76 Atl. 571.

§ 50. **Representation Made Warranty.**—Ordinarily a misrepresentation of the assured will not affect the validity of a policy unless it is material to the risk, or, by the terms of the application and policy, has become an affirmative warranty. When the parties by the terms of their contract expressly stipulate that a representation shall be regarded as material, it ceases to be a representation only, and becomes a warranty. "When a policy is issued on the faith of representations of the assured as to existing facts, such representations become warranties, with the result that, if they be not strictly true as made, the policy, without regard to their materiality, will not take effect. The parties being agreed upon the materiality of the statements warranted, are thereafter precluded from questioning their materiality."

In an application for an automobile fire policy the description was "hereby made a warranty by the applicant" and the policy made the statements in the application a warranty and part of the policy. A stipulation was also contained in the policy that it should be void for concealment or misrepresentation of material facts. Statements in the application that the car was new and had cost $4,300 were shown, in an action on the policy, to be untrue. It was held the statements were warranties and not representations, and no recovery could be had on the policy. Miller v. Commercial Union Assurance Co. (1912) 69 Wash. 529, 125 Pac. 782.

§ 51. **Materiality of Representations.**—Whenever the misrepresentation would have, or might have, a real influence upon the underwriter either not to underwrite at all, or not

to underwrite except at a higher premium, it must be deemed material to the risk. Smith v. American Automobile Insurance Co. (1915) 188 Mo. App. 297, 175 S. W. 115. The question of materiality is usually for the jury to determine; "except in such clear cases as can be determined by the court as a matter of law." Smith v. Automobile Insurance Co. (1915) 188 Mo. App. 297, 175 S. W. 115; Locke v. Royal Insurance Co. (1915) 220 Mass. 202, 107 N. E. 911; Orient Insurance Co. v. Van Zandt-Bruce Drug Co. (1915) 50 Okla. 558, 151 Pac. 323; Traynor v. Automobile Mutual Insurance Co. (1921)—Neb.—181 N. W. 566.

In an action on an automobile fire policy the North Carolina Supreme Court holds that every fact stated in the application for such a policy will be deemed material which would materially influence the judgment of an insurance company either in accepting the risk or in fixing the rate of premium. To defeat recovery, it is not necessary that a material misrepresentation by the applicant must be shown to have contributed in some way to the loss for which indemnity is claimed. Lummus v. Fireman's Fund Insurance Co. (1914) 167 N. Car. 654, 83 S. E. 688.

Section 2565 of the California Code provides that "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantage of the proposed contract, or in making his inquiries." Solomon v. Federal Insurance Co. (1917) 176 Cal. 133, 167 Pac. 859.

§ 52. **Misrepresentations—Intent to Deceive.**—In an action on an automobile fire policy, the insurance company, as a defense, relied upon the fact that the owner, at the time the insurance was obtained, represented that the automobile, a Winton car, was manufactured in the year 1911, and that when purchased by the insured in October, 1911, it was new and had cost the insured $3,400, whereas, in fact, the automobile was a 1910 model, and when purchased by the insured was

a secondhand car, and had cost her $2,000, $800 paid in cash and $1,200 in trade; that had the insurance company known the car was a 1910 model, or a secondhand car, or that it had cost the insured only $2,000, the policy, which was for $1,000, would not have been issued. The contract of purchase between the insured and the Winton company described the car as a 1910 model. The premium on secondhand cars is higher than on new cars, and the Washington insurance law requires schedules of rates to be filed with the insurance commission, deviation from which renders the insurance company guilty of a misdemeanor. The insured's husband knew that the car was secondhand, and admitted that he represented it as a new car, but denied that he knew it was a 1910 model, or he had forgotten the actual date of manufacture. The insured relied upon the Washington statute, section 6059-34 Rem. Code, providing that misrepresentations or warranties shall not be deemed material or defeat the policy, unless made with the intent to deceive; and argued that although these representations were made with knowledge of their falsity, it was a question for the jury to determine as to whether they were made with intent to deceive.

It was held that the rule that intent accompanying false and fraudulent statements should be submitted to the jury "should not be so far extended as to include a case such as this, and allow insurance to be enforced which was not procurable had the truth been told, where it was issued relying upon fraudulent statements, and the proof of honest intent consists merely in the applicant's bare affirmation that his intent was honest. The proof of the making of false and fraudulent representations raises a presumption of dishonest motive which must be overcome by evidence establishing an honest motive. It is true that motive and intent are mental states, and that evidence of the mental state of an applicant is sometimes hard to prove where there are no other facts or circumstances to establish it other than the applicant's own declaration. However, honesty and fair dealing would seem

to require that, in order to overcome the presumption, there must be some testimony more concrete than was here given when an applicant admits, as he does here, that the representations were made with the knowledge that they were untrue. It may be that representations made at a time when the applicant may have forgotten the facts, or made through carelessness or mistake, or where the representative of the insurance company had prior knowledge of the facts which were contrary to the representations made by the applicant, make submissible to the jury the question of whether the applicant acted with intent to deceive or not. In this case the respondent (the owner) admits that the statements were 'material enough to avoid the policy if there was an intent to deceive,' and, they having been made with knowledge of their falsity, a presumption arises of the intent to deceive, which presumption is not overcome by the unsupported declaration of the applicant that no such intent existed in his mind at the time." It was therefore held that the insurance company's motion for judgment notwithstanding verdict for the plaintiff should have been granted. Day v. St. Paul Fire & Marine Ins. Co. (1920)—Wash.—189 Pac. 95.

§ 53. **Misrepresentations as to Cost of Automobile.**—The California Supreme Court says in Solomon v. Federal Ins. Co.: "The purchase price of a second-hand automobile is particularly important in a valued policy, as it must be manifest that an insurance company will not agree to pay, say, $3,000 for the loss of an automobile which cost the insured but $2,500. This is not a case of overestimating the value of the thing insured, which in an open policy is not necessarily fatal; here we have the statement of a fact, the price the insured paid for the car. No question of mistaken opinion is involved. Where a valued policy is issued upon the basis of the application alone, as in this case, it is difficult to see what could be more important to the insurer in determining the amount of the policy than positive statements of the year in which the car

was built and the price paid for it by the insured." Solomon v. Federal Insurance Co. (1917) 176 Cal. 133, 167 Pac. 859.

In an action on an open policy, the Texas Court of Civil Appeals said: "Generally stated, a fact would be material to the insurance risk which would induce the insurance company to decline the insurance altogether, or not to accept it at a higher premium." Where a car insured against fire was represented to have been run a few months less than it had been and to have been purchased for a sum stated, instead of traded, and it appeared that the matters stated did not have an effect upon, and could not have changed, the rate of premium charged if correctly given, it was held they were not material to the risk. St. Paul Fire & Marine Ins. Co. v. Huff (1915)—Tex. Civ. App.—172 S. W. 755. A defense to an action on an automobile fire policy alleged fraud in that the application had represented that the car, a Velie, was obtained by exchanging a Ford and money therefor, whereas in fact the Ford car, with cash, was first exchanged for a Crow Elkhart automobile, and the latter, with boot money, traded for the car insured. The court said that possibly the son of the insured, who did the trading, found it necessary, in order to substitute the Velie automobile for the Ford car, to first exchange the Crow Elkhart car, and then for that in question. The answer may have been made on that theory. Whether so or not, the record was found to contain nothing tending to show a dishonest motive, or that the insurer was misled by the inaccuracy of the answer. The charge of fraud was therefore denied. White v. Home Mut. Ins. Ass'n of Iowa (1920)—Iowa—179 N. W. 315.

§54. **Misrepresentation as to Price May be Question for Jury.**—It may be a question of fact for the jury, under the evidence, whether or not any misrepresentation was made about the car being paid for in cash and also as to whether such a misrepresentation, if made, was material to the risk. And where the insurance company contended that, if its solicitor had known that the insured had not paid as much as 50

per cent. of the value for the car, at least 33 1/3 per cent., the company would not have issued the policy, but the testimony of the company's witnesses left it in doubt whether the policy would have been issued under the circumstances of the case, where the automobile dealer who sold the car to the insured had taken notes in full payment of the machine, it was held that to have submitted a special issue requested by the company as to whether the car was fully paid for and to have had it answered in the affirmative would not have made it an ultimate basis for a judgment for the defendant, for the reason that either the court or jury must have followed this finding with the further finding that such a misrepresentation was material to the risk in that it would probably not have issued the policy had it possessed the knowledge and the latter issue was not submitted. California Ins. Co. v. Eads (Tex. Civ. App. 1919) 209 S. W. 216.

§55. **Knowledge by Company's Agent of Cost.**—If an agent of the insurance company was informed of the true cost of the car, and, notwithstanding this knowledge, procured a policy to be issued by the insurance company, without any representation as to its cost on the part of the owner, it is held that the erroneous statement of the actual cost of the car to be $2,000 on the schedule of statements endorsed on the policy is to be regarded as that of the company with full information, and it is estopped to assert the contrary. A policy insured an automobile against loss by fire in the amount of $1,750. On its total destruction by fire the insurance company declined to pay the loss, because, it said, the insured made a false and fraudulent representation material to the risk with respect to the cost of the automobile which induced the issuance of the policy in the first instance, and also because the policy stipulated a warranty in respect of the matter of the actual cost. No written application was executed by the insured prior to the issuance of the policy, but a schedule of statements endorsed thereon contained the following: "Actual cost to assured, including equipment—$2,000." It ap-

peared, in an action on the policy, where these two defenses were made, that the plaintiff purchased the automobile shortly before it was insured at the price of $1,000. It was a second-hand touring car and it sold originally, when new, for some $3,500 or $4,000. After its purchase the plaintiff added to it other equipment at an outlay of $427.46, so that when the insurance was effected the automobile had actually cost her $1,427.46. The plaintiff, however, asserted that she made no representation to the insurance company or to the broker who negotiated the insurance, who was a friend of the person who sold her the automobile. The question arose whether this broker was agent for the plaintiff or the insurance company in respect of the representations. It was held that, the company being accustomed to deal with the broker and pursuing an established custom of trusting to representations made by him, having made him its agent for the purpose of delivering the policy, collecting the premium, compensating him for the service by an allowance of commission, and having established and pursued a custom in accepting the representations of the broker as to such material matters concerning the property insured, the broker was to be regarded as the agent of the insurance company thereabout, in cases where it is entirely clear that he is in no manner the agent of the insured. Farber v. American Automobile Insurance Co. (1915) 191 Mo. App. 307, 177 S. W. 675. In a later case it is said that it is by no means clear, though the point has not been expressly decided, that the insured, after retaining the policy for a year, can then insist that a misdescription of the car insured, sufficient to constitute a breach of warranty, was the act of the insurance company and entirely unknown to the insured. Solomon v. Federal Insurance Co. (1917) 176 Cal. 133, 137, 167 Pac. 859.

§ 56. **Representations as to Year Model.**—Representations as to the year model of the automobile are, as a rule, held to be material. An automobile fire policy contained a warranty that the car was a model of 1910. The car was burned about

a month after it was insured. In an action on the policy it was agreed that the machine was a model of 1907. The defense was that this misrepresentation and warranty rendered the policy void, being material to the risk and therefore not affected by Missouri Revised Statutes 1909, section 7024, which avoids the effect of all other warranties. The rate sheet issued by the insurance company to its agents, and by which they were governed in writing automobile insurance, prohibited the writing of fire insurance upon "any car prior to 1908 model." It allowed *liability* insurance to be written on cars more than four years old but not fire insurance. And the testimony was that no fire insurance was permitted or written on cars over that age. The rate sheets also showed that there was a continuous decrease in the amount of insurance allowed on a car the older it got during the years a car was insurable. It was held that the misrepresentation was material as a matter of law. If the car was represented to the company to be only two, when it was five years old, and the company had no means nor opportunity of knowing differently, then there was no contract of insurance entered into by the compay with reference to the car. The principle involved was more than the question whether the fire was attributable to the age of the car. If that were the question, then of course it would be for the jury to say whether the misrepresentation was material to the risk. But the materiality depends upon whether, had the true facts been known, the company would have insured it at all or would have limited itself to the premium charged. Smith v. American Automobile Insurance Co. (1915) 188 Mo. App. 297, 175 S. W. 115.

To describe an automobile in a valued policy as being made in 1909, when in fact it was made in 1908, is such a material misdescription of the thing insured as to constitute a breach of the express warranty provided for in section 2607 of the California Civil Code. Solomon v. Federal Insurance Co. (1917) 176 Cal. 133, 167 Pac. 859.

An automobile fire policy issued in October 1912 contained the following clause: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof." The statement made to the insurance company's agents, and embodied in the policy, was that the automobile was a No. 877 Premier, 40 horse power, 4 cylinder touring car, built in 1910. In fact it was a 24 horse power car, capable of developing 29 horse power, and built in 1906. It was held that the misrepresentation that the car was a 1910 model was clearly a misrepresentation of a material fact. "It is impossible for insurance agents to ascertain the condition of the car from its outside appearance. The condition largely depends upon the wearing of the gears, which are concealed within metal-bound cases. It also largely depends upon the year of manufacture, important changes being made from year to year to remedy defects and to add to convenience and safety in the use of the cars. It is a matter of common knowledge that in 1912 a 1910 Premier was of a value greatly in excess of a 1906 Premier of the same model." Reed v. St. Paul Fire & Marine Ins. Co. (1915) 165 N. Y. App. Div. 660, 151 N. Y. Supp. 274.

A used car, constructed in 1906, and insured in November, 1909, is not of the same insurance value as a car constructed in 1907, and the statement of the applicant that the car was of the 1907 model was held a material representation, upon which the insurance company had a right to rely, in issuing a valued fire policy in the sum of $2,000. Harris v. St. Paul Fire & Marine Ins. Co. (1920) 126 N. Y. Supp. 118.

It is held that a car was new within the meaning of an application for insurance when it was bought by the employer of the plaintiff insured in January 1915 for the plaintiff and kept in the employer's garage, the title remaining in the employer till about March 1, when the plaintiff was able to pay for the machine, and which was then insured. Rabinowitz v. Vulcan Insurance Co. (1917) 90 N. J. L. 332, 100 Atl. 175.

§ 57. **Same—Good Faith of Insured Immaterial.**—The fact that material misrepresentation as to the age of the car insured was innocently made does not change or affect the matter. When the insurer makes inquiry about facts material to the risk, he is justified in acting upon the presumption that the information imparted by the applicant is correct. The representations of the applicant become the basis of insurance, and if they be false, touching matters material to the risk, the contract obtained through their influence cannot be enforced; and it is, in such case, quite immaterial whether the misstatement resulted from bad faith or from accident or ignorance. Smith v. American Automobile Insurance Co. (1915) 188 Mo. App. 297, 175 S. W. 115.

§ 58. **Same—Inspection by Company's Agent.**—An inspection of the car by the insurance company's agent will not avoid the effect of a material representation as to the model of the car where there are no means of telling by such inspection what model it was. Smith v. American Automobile Insurance Co. (1915) 188 Mo. App. 297, 175 S. W. 115. This is not inconsistent with the decision in British & Foreign Marine Insurance Co. v. Cummings, one of the earlier automobile insurance cases, where it appeared that application for a fire policy stated that the automobile was built in 1907 by the Pope-Toledo Company. The machine was examined by the company's agent, who approved the application and a policy was issued. The car was destroyed by fire. The company denied liability because the machine was built in 1906, and on cars built in that year the premium was higher, and the amount of insurance allowed was less than on those built in 1907. In making the representation as to the year the insured acted in good faith, on information given him by the vendor. An inspection of the car would not disclose the year of manufacture, but its number, in connection with the manufacturer's rules and catalogues, would have shown that it was made in 1906. It was held that the representation as to the year was not a warranty, but related to a fact which was not

especially within his knowledge; that this fact could and ought to have been ascertained by the company's agent on his examination, and that the representation was therefore no bar to recovery on the policy. British & Foreign Marine Ins. Co. v. Cummings (1910) 113 Md. 350, 76 Atl. 571.

In a later case it appeared that while the application erroneously stated 1913 as the year when the car, a Stearns, was built, it correctly stated the model as 30-60, and thus the application put in possession of the company the means of learning that no Stearns automobiles of the model 30-60 were built after the year 1910, or early in 1911. With this information furnished in the application, it was held that it could not be said as a matter of law that the company was deceived by the misstatement of the year in which the car was built. Traynor v. Automobile Mutual Insurance Co. (1921) —Neb.—, 181 N. W. 566.

In an action on a policy where the defense was false representations as to age and model, the company was not estopped from making such defense by the failure of its local agent to leave his office to look at the car when the owner called his attention to the fact that the number of the engine as given in the policy was wrong, and nothing was then known to create suspicion that the information as to the age of the car was false; nor was the company estopped from relying on the misrepresentations by the fact that in a subsequent conversation with the insurer's agent the insured did not do anything further to mislead the company. The original act of misrepresentation was a positive one and of such a nature as to invalidate the policy. Day v. St. Paul Fire & Marine Ins. Co. (1920)—Wash.—189 Pac. 95.

§ 59. **Same—May Be Question for Jury.**—The question whether misstatements as to the year model are material may be, under the evidence, for the jury. Two actions, tried together, were based on three fire insurance policies over cars destroyed by fire. One, issued by the Royal Insurance Company, was in the non-valued form of $1,500 on a Fiat automo-

bile. The others were valued policies issued by the Columbia Insurance Company, one for $1,800 on a Hotchkiss automobile, the other for $650 on another Hotchkiss car. The cars were admittedly worth more than the amounts for which they were insured. The substantial defense was misdescription of the cars in the application and policies, with reference to the year model. In all other respects, such as factory number, type of body, the number of cylinders, horse power, etc., the descriptions were conceded to be correct. The defendants contended that while the cars were described as of a 1908 model, the Fiat car was of a 1907 model and the two Hotchkiss cars of the 1906 model. It appeared that 1908 was specified, not as the "year of manufacture," but as the "year model." They were all foreign cars. There was evidence that foreign makers do not make distinct yearly models, as American manufacturers do, and that at that time European cars used to be designated as 1905-1906, 1906-1907, etc., and not by single years. There was also testimony that the difference between a Hotchkiss 1906 and a 1908 car would be hardly discernible, and that a Fiat car of 1907 and one of 1908 were substantially identical. So far as the cases involved the identification of the automobile insured, the jury could find that the minds of the parties were in accord. There was also evidence that no greater premium would be charged for a Fiat 1907 than for a Fiat 1908, and that therefore the misstatement, if made, did not increase the risk of loss and was immaterial. The Hotchkiss cars were insured as "Dealers' Automobiles," and admittedly the rate was properly determined by adding one per cent to the basis rate for new cars, and did not depend upon their age. It was held that the question as to whether the misstatements as to year model were material was for the jury, which found for the plaintiff. Locke v. Royal Insurance Co., Ltd. (1915) 220 Mass. 202, 107 N. E. 911.

In a later case it was held that the age of an automobile upon which insurance is sought is material only in so far

as it affects its value and thereby the moral hazard to be assumed by the company; and where an applicant for insurance upon a second-hand rebuilt automobile in his application incorrectly states the year in which the car was originally built, but also in his application states other facts from which the insurance company, by ordinary diligence, could have ascertained the correct year, it cannot be said as a matter of law that the insurance company was "deceived * * * to its injury" within the meaning of section 3187, Nebraska Rev. St. 1913, which provides that no misrepresentation or warranty is to be deemed material or sufficient to avoid the policy unless it "deceived the company to its injury." Traynor v. Automobile Mutual Insurance Co. (1921)—Neb.—, 181 N. Y. 566.

The automobile in this case was a Stearns built in 1910, stated by the applicant to have been built in 1913. The model was correctly stated as Model 30-60. The evidence showed that the Stearns company turned out no Model 30-60 cars afterJuly 1, 1911. The car itself bore no evidence of when it was built. The car had been practically destroyed by fire and partially rebuilt in 1913 and in 1914 was completely rebuilt and changed from a four-passenger touring car to a two-passenger roadster. The court said: "The only materiality of the year when the car was originally built was as it affected its value and thereby the moral hazard of the risk assumed by the company. As the automobile in this case had been partially rebuilt in 1913 and completely rebuilt in 1914, the year when it was originally built was not much of an index to its real value. Originally it was a four-passenger touring car and it was almost entirely changed. It might well have been that after having been rebuilt in 1914 it was more valuable than a new car built in 1913. Hence we do not consider that the erroneous statement in the application that the car was built in 1913 was under the circumstances very material, and certainly it was not sufficiently material under our statute to warrant the court in holding as a matter of law that it deceived the insurer to its injury. For this rea-

son, we believe that the order directing a verdict for defendant was erroneous."

§ 60. **Identification of Automobile.**—In an action on a fire policy, where the automobile burned was identified as that described in the policy, as the only automobile owned by the insured, and as the one intended to be covered by the policy, it was held to be no defense that the license number was incorrectly stated in the application. And where the description of a burned car by number was ambiguous, it being shown to have a serial number given it at the factory and that of the license plate, and no indication being made as to which was intended in the application or policy, extrinsic evidence was held rightly resorted to, to show what was intended. White v. Home Mut. Ins. Assn. of Iowa (1920)—Iowa—, 179 N. W. 315.

§ 61. **Renting and Hiring Warranties.**—The renting and hiring warranty in an automobile insurance policy is usually, by its terms, a promissory warranty, a breach of which will avoid the policy. An automobile fire policy contained as one of its terms the following:

> "17. Warranted by the assured hereunder that the automobile hereby insured shall not be used for carrying passengers for compensation or rented or leased during the term of this policy; and in the event of violation of this warranty this policy shall immediately become null and void."

Having been inserted in the body of the policy, this warranty was not dependent upon the negotiations embodied in the application and final issuance of the contract of insurance, which were said by the plaintiff to include a statement by him to the insurance company's agent that the car would be rented a little for hire in the summer, on which the agent assured the plaintiff that that would make no difference to the insurance company; and the Massachusetts statute of 1907, c. 576, § 21, as to intent to deceive and increase risk of loss was held to be inapplicable. If the automobile was used

for the transportation of passengers for hire the plaintiff stipulated that the policy should be void, and the only remaining question was, whether upon the evidence it could be ruled as matter of law that the warranty had been broken. It was agreed by the parties, that with the plaintiff's knowledge and consent the plaintiff's son, for compensation which he received and retained, made trips during August and September with the automobile for the accommodation of tourists and passengers; and this use having been permitted by the plaintiff, there was a violation of the warranty at common law, and whether the risk had been increased was immaterial. The policy was therefore not in force when, in March following, the automobile was damaged by fire. Nor was the insured entitled to a return of any part of the premium. The policy attached and while the premium covered the life of the policy if its terms were complied with by the insured, the latter could not through his voluntary breach deprive the insurance company, which was without fault, of the full benefit of the contract. Elder v. Federal Insurance Co. (1913) 213 Mass. 389, 100 N. E. 655. It is held that it is not necessary that there should be a provision in the policy that a breach of a promissory warrant as to renting therein shall avoid the policy. So, if the insured warrants that he will not use the car for carrying passengers for compensation, this warranty is a part of the policy and a breach of it avoids the policy, even if there is therein no provision to that effect. The following provision in an automobile fire policy: "It is warranted by the insured that the automobile hereby insured, during the term of this policy, shall not be used for carrying passengers for compensation, and that it shall not be rented or leased," constitutes a promissory warranty, and a breach thereof by the insured prevents recovery. Whether the risk was increased is immaterial. Orient Insurance Co. v. Van Zant-Bruce Drug Co. (1915) 50 Okla. 558, 151 Pac. 323.

A different result may be reached where the warranty by its terms is not a promissory warranty. Where an indemnity

policy over an automobile truck containing a general warranty that the truck was to be used for "delivery," provided that: "None of the automobiles herein described are rented to others or used to carry passengers for a consideration, actual or implied, except as follows;" and in the blank space following was inserted: "No exceptions," it was held that this provision should be construed as a warranty merely that the truck was not rented at the time the policy took effect, and did not preclude the insured from maintaining an action against the insurance company for damages paid to a person in settlement for injuries by the truck which, after being stored with a garage company, was sent out by the latter in charge of a chauffeur hired and paid by the garage company to deliver for another company. Mayor Lane & Co. v. Commercial Casualty Ins. Co. (1915) 169 N. Y. App. Div. 772, 155 N. Y. Supp. 75.

Where the renting provision declares that: "In the event of violation of this condition this policy shall forthwith cease and terminate," and the car is destroyed by fire after the carrying business has ceased, the insurance company will not be held liable. A contract provision worded as above cannot be suspended during the machine's use for hire and re-instated when the machine is not so used. The court said: "This may be so under some circumstances, but we think the language here too positive to bear such construction. If the premium of the policy be fixed on the terms of the contract, why should the insured be permitted to suspend and reinstate the contract at will? If plaintiff's contention be allowed this would be the effect upon the contract." Kress v. Insurance Co. of State of Pennsylvania (1915) 18 Luzerne (Pa.) Legal Register 278.

A policy was held void for breach of the renting warranty in Hamilton v. Fireman's Fund Insurance Co. (1915, Tex. Civ. App.) 177 S. W. 173.

§ 62. **Same—Warranties Apply Both to Mortgagor and Mortgagee.**—The condition in an automobile fire policy issued

to the mortgagee and mortgagor of the car, as their respective interests might appear, that the car should not be used for renting purposes or for hire, applies both to the mortgagor and the mortgagee. Where a fire insurance policy over an automobile issued to the plaintiff and one who bought the car from the plaintiff and gave back a mortgage for part of the purchase price provides that the automobile shall not be used for renting purposes or for hire, and the evidence shows that the car was used mainly, if not entirely, for livery purposes and uses by such mortgagor, there can be no recovery under the policy. Marmon Chicago Co. v. Heath (1917) 205 Ill. App. 605.

§ 63. **Same—Occasional Use for Hire Held No Breach.** An automobile fire insurance policy contained these clauses: "It is warranted by the insured that the automobile hereby insured during the term of this policy shall not be used for carrying passengers for compensation, and that it shall not be rented or leased." "In the event of violation of any warranty hereunder, this policy shall immediately become null and void." It was held that the former of these provisions should be construed as prohibiting the owner from using the automobile continuously for carrying passengers for hire as a business, and that it was not breached by the fact that the owner's son had used the car on two or three afternoons during a fair without the owner's knowledge for carrying passengers for hire to and from the fair-grounds. Commercial Union Assurance Co. of London v. Hill, (Tex. Civ. App. 1914) 167 S. W. 1095.

A clause in a fire policy provided: "The motor car hereby insured will not be rented or used for passenger service of any kind for hire, except by special consent of this company endorsed hereon in writing." The car was kept by the insured, a garage keeper, for his own use, and was not rented for hire, though it had been used once to take a man to the railroad station. The car was taken from the garage by one of the insured's employees, and used to carry a party of

hunters for hire. On the return journey it was punctured and left on the road. After the owner resumed possession of it, and was taking it back to the garage, it was burned. The proof of loss stated it had been used for the owner's private purposes "and some for hire."

It was held that the parties, by the clause quoted, apparently contemplated, not a single act of renting or using the car for hire, a mere casual or isolated instance, and that, too, without the knowledge or consent of the owner, but something of a more permanent nature. The carrying of the man to the station, if forbidden, was too remote from the time when the car was burned.

The clause was somewhat obscurely worded and therefore the court gave it the construction which favored the insured, as it involved a question of forfeiture. The words "passenger service," when considered in connection with the preceding words, "rented" or "used," imply more than a single act of renting or using, and refer to the business of carrying passengers for hire. Being susceptible of this meaning, which, under the familiar rule applicable to such cases where the language is not clear and definite, the court was authorized to give them, it held the clause did not apply to the case. Crowell v. Maryland Motor Car Insurance Co. (1915) 169 N. Car. 35, 85 S. E. 37.

§ 64. **Same—Effect of Statute Abolishing Warranties.**—A Kansas policy contained a warranty that the insured would not let out the automobile for hire without written permission from the insurance company. In an action on the policy when the car was burned it appeared that on one or two occasions this provision was violated; but at the time the car was burned it was not hired. The Kansas statute has abolished warranties and turned them into mere representations unless the matter warranted is material to the risk. It was held that the matter warranted was not material to the risk and the viola-

tion of the warranty did not violate the policy. Berryman v. Motor Car Trust Co. (1908) 199 Mo. App. 503, 204 S. W. 738.

§ 65. **Same—Violation for Jury—Burden of Proof.**—The question of violation of the renting provision is usually one for the jury. Whether the duty of establishing the defense that the renting provision of the policy has been violated rests ordinarily upon the defendant apparently has not been decided; but where a statement written by the company's adjuster and signed by the insured is given in place of proof of loss containing the statement that the policy had been violated by the carrying of passengers, and the insured is notified before the trial by the affidavit of defense that he had not complied with this term of the policy, this necessarily demands proof of such compliance. Dunn v. First National Fire Insurance Co. (1918) 14 Schuylkill (Pa.) Legal Record 389. In an action against an insurance company for the loss of an automobile by fire, an averment in the affidavit of defense that the insured had carried passengers for hire contrary to the terms of the policy is sufficient on that point without giving the names of the passengers and the dates on which they were carried; the defendant not being required in the affidavit of defense to set forth the manner in which the facts therein will be proven, or the evidence by which they will be substantiated. Shaw v. Liverpool & London & Globe Ins. Co. Ltd. (1915) 16 Lackawanna Jurist 288.

§66. **Location of Automobile—"Private Garage."**—The location of the automobile is essentially material to the contract. So, where an automobile insured under a policy containing a private garage warranty was, without the company's knowledge or consent, removed to another city in another state, where it was kept five or six months, and then placed in a repair shop where it was burned, the removal was held permanent and the policy void. Lummus v. Fireman's Fund Insurance Co. (1914) 167 N. Car. 654, 83 S. E. 688. The court said. "Nothing is better settled than

that the location of the property insured is essentially material in contracts of insurance and enters largely into the consideration of the company in fixing the rate of premium. The clause of the policy in this case, containing this warranty, expressly declares that a reduced rate of premium is granted because of the insertion of this provision in the contract. The contention of the plaintiff that the policy could remain dormant for six months and then be revived suddenly because the property was burned up in a repair shop is utterly untenable."

A fire insurance policy described the car insured as "usually kept in a private garage on lot.—" It was, in fact, kept in a lean-to to the insured's barn, in which it was burned. It was argued that this was not a garage. The court said: "The word 'garage' was recently appropriated from the French language, there meaning keeping under cover, or a place for keeping, and, as employed in English, is accurately defined by Webster's Dictionary, substantially like that of the Century Dictionary, as 'a place where a motor vehicle is housed and cared for.' To be such, the place need not be apart from other buildings, though that may be the more common and appropriate way. If the 'place' be in a 'lean-to' attached to another building, as a barn or corncrib constructed for the purpose, or, having been erected, is set apart for the housing of the automobile, it is none the less a 'garage' within the meaning of that word in either language. In French the word has reference to the place of keeping wagons and other vehicles of transportation, as well as automobiles; but in English it appears to have been restricted to motor vehicles.

"The automobile in question was kept in the front end of a lean-to 16 feet wide and 26 feet long, attached to plaintiff's barn. By its side was kept a buggy, and fence or partition back of it, to separate the vehicle from the stock. As to the automobile, this was a 'private garage,' within the meaning of that expression found in the application." White

v. Home Mut. Ins. Assn. of Iowa (1920)—Iowa—179 N. W. 315.

§67. **Waiver of Location Warranty.**—A company which accepts the premium and issues the policy with knowledge of the place where the automobile is actually kept must be deemed to have waived any mis-statement with reference to its locality. White v. Home Mut. Ins. Assn. of Iowa (1920)—Iowa—179 N. W. 315.

An automobile fire insurance policy contained the following clauses: "Private Garage Warranty. In consideration of the reduced rate at which this policy is written it is understood that the property insured hereunder shall at all times be kept or stored in the private garage or private stable situated at 1000 So. Harwood Street, Dallas, Texas. Privilege, however, to operate car and to house in any other building or buildings for a period of not exceeding fifteen days at any one location, at any one time, provided the car is en route, visiting or being cleaned or repaired, all other terms and conditions of the policy remaining unchanged." It was held, in an action on the policy, that evidence that the insurance company's general agent was informed by the insured as to certain visits to other places, and was told that the company had no objection and that no written waiver was necessary, was sufficient to show a waiver of the warranty, the general agent being impliedly authorized to make waivers. Commercial Union Assurance Co. of London v. Hill, (Tex. Civ. App. 1914) 167 S. W. 1095.

§68. **Other Insurance.**—A provision in an automobile fire policy that "it shall be null and void if at the time a loss occurs there be any other insurance covering the risks assured by this policy" will prevent recovery where the automobile was insured in another company against fire and theft under a policy containing a covenant against other insurance on the same risks without the consent of the insurer, where the second policy is not declared void for

breach of the covenant. Dimmick v. Aetna Insurance Co. (1919) 213 Ill. App. 467. In an action on a policy to recover for the loss of an automobile which was stolen and burned, a defense was that the plantiff had not disclosed other insurance over the car when he applied to the defendant company for a policy. The first policy, with another company, was one for fire only. The policy in this case was for fire, collision and theft, although it was held that the evidence supported the insured's theory that she did not apply to the defendant company for fire insurance on her car, but applied for theft insurance. It was held that the fact, if it were a fact, that the company's agent may have filled in the application signed by the plaintiff, so as to request insurance for fire, theft, etc., unless the plaintiff's attention was called thereto when she signed the application, would not of itself bar the plaintiff from recovering for damages sustained by reason of the theft of her automobile, even although prior to that time she had taken fire insurance in another company. Dimmick v. Illinois Automobile Fire Insurance Exchange (1920) 216 Ill. App. 543.

Proof of the existence of other insurance avoiding the first policy is sufficiently established by the plaintiff himself introducing in evidence the second policy expressly covering the same risk, and proof thereof by the defendant insurance company is then unnecessary. Dimmick v. Aetna Insurance Co., 213 Ill. App. 467, (1919).

§69. **Other Insurance Does Not Necessarily Forfeit Policy.**—A clause that the policy will become void if other insurance has been taken which covers the property at the time of the loss does not necessarily forfeit the policy by the taking of other insurance, and is no ground for an action for unearned premiums where no notice of such additional insurance has been given to the company and no loss occurred to the property. An insured sued for a return of unearned premium from a certain date for the reason that

the policy had become void on that date, when he took out a policy in another company covering the loss, this policy providing: 'If at the time a loss occurs there be any other insurance, direct or indirect, covering the property described therein which would attach if this insurance had not been effective, and if such other insurance has been effected without the special consent of this company endorsed hereon, then, in that event, this insurance shall be null and void."

As by the very terms of this covenant the policy was only to become void in case of other insurance at the time a loss occurred, and no loss having occurred, the policy never became void. The insured might have cancelled the policy he had taken out in some other company at any time before a loss occurred and if he had done so his rights under the first policy would not have been affected by the fact that he at one time had insurance in some other company. Healy v. Stuyvesant Insurance Co. (1918) 72 Pa. Superior Court, 168. The court said: "When a policy expressly stipulates that the taking out of other insurance without the consent of the company shall render the policy void, the insured is not entitled to a return of his premium merely because he has violated the covenants of his policy. The object of the clause is to give the company an opportunity to examine into a new factor which may alter its position in the contract, and to regulate its action accordingly. This opportunity it cannot have until the notice is received. The company is entitled to notice of such material change in the relation of the amount insured to the value of the property, and an opportunity to accept and approve the contract in its new condition, or to terminate and cancel the insurance in the method provided in the policy."

§70. **Misrepresentations as to Ownership.**—The Springfield Fire and Marine Insurance Company issued a policy of insurance in the amount of $1,000 to the Chero Cola Bottling Company on May 22, 1915, for the term of one

year, covering an automobile truck, which the insured, in an action on the policy, alleged was totally destroyed by fire on April 24, 1916, entailing a loss of the full value thereof, amounting to $1,300. In the defense filed by the insurance company it was alleged that the policy was, according to its own terms and provisions, violated and rendered inoperative by reason of the fact that the interest of the insured was not truly stated therein, and that the "interest of the insured was other than unconditional and sole ownership," as required by the policy, in that prior to the date of its issuance the title to the property covered by the contract had been conveyed under a bill of sale executed by the insured to the Washington Exchange Bank. A further condition of the policy was pleaded, in which it was provided that "this entire policy shall be void in case of fraud or false swearing by the insured touching any matter relating to the insurance or the subject matter thereof, whether before or after loss," the defendant averring that the plaintiff, in its proofs of loss, was guilty of violating these terms of the contract by its misrepresentaion and concealment of the facts as to the property being in any way incumbered. The plaintiff sought to meet these defenses thus set up by showing that the bill of sale referred to as executed by it to the Washington Exchange Bank, though absolute on its face, was, in fact, a sale to secure a debt, and that since usury was included in that transaction the instrument was void, and consequently there had been no change of title. The verdict was for the plaintiff in the sum of $600. The defendant excepted to the refusal of its motion for a new trial. It was held that the conveyance of title above referred to being a valid one, the policy, according to its terms, was thereby rendered inoperative and void. Though the note to the bank bore date as of March 8th, the transaction must, under the evidence, be treated as having been in fact closed on March 5th, which was in fact the date shown by the bill of sale, and therefore the discount included in

the note was not usurious. Springfield Fire and Marine Insurance Co. v. Chero Cola Bottling Co (1918)—Ga. App.—96 S. E. 332.

§71. **Change of Ownership.** Where an insured automobile dealer, without the knowledge or consent of the insurance company directly or through any agency, parted with the possession of the automobile, delivering it to another under a contract for its purchase by the latter, who drove it into another state, where it was destroyed by fire, this constituted a breach of the required provisions mentioned in the Oregon standard policy law, making the "entire policy void unless otherwise provided by agreement indorsed hereon or added hereto * * * if any change, other than by death of an insured, takes place in the interest, title, or possession of the subject of insurance," and the insurance company was held not liable under its covering notes for the loss. Under the presumption of section 799, subdivision 34, L. O. L., "that the law has been obeyed," where an insurance company's covering note provided that the insurance was subject to all the terms and conditions of the automobile floater policy in use by the company covering fire, theft, and transportation, it must be presumed that the policy contained the provisions enjoined by the Oregon standard policy law (Laws 1911, p. 279), such as a provision as to forfeiture on change of the insured's interest, title, or possession. Cranston v. California Insurance Co. (1919) 94 Or. 369, 185 Pac. 292.

Where a policy holder makes a positive statement under oath that he was the owner of the automobile at the time of its destruction, the insurance company is not bound to make further inquiry, and may recover the amount, with interest, collected by means of such statement, if it is untrue. It is immaterial that the policy holder believed the statement made by him to be true. The seller of an automobile reserved title to secure the unpaid purchase price,

and also, for further security, retained a fire policy over the machine, which provided that a change in title should invalidate the policy. The buyer thereafter mortgaged land to the seller receiving a few hundred dollars in money and the seller returning his note for the price of the automobile, which note was destroyed. It was held that in view of the Texas statute,, Rev. St. art. 5654, declaring that all reservations of title to chattels to secure the purchase money shall be held chattel mortgages, there was an absolute sale with reservation of a chattel mortgage, so that the policy was avoided, the policy declaring that a change in the title would invalidate it. Hamilton v. Fireman's Fund Insurance Co., (Tex. Civ. App., 1915), 177 S. W. 173.

§72 **Waiver of Conditions as to Ownership.**—If, at the time of issuing a policy, an insurance company is informed that the insured is not the unconditional owner, or if after it receives such knowledge, and thereafter fails to rescind for an unreasonable time and retains the premium, it thereby waives the condition. If, upon the receipt of the proof of loss the insurance company rejects the claim upon the sole ground that the insured was not the sole and unconditional owner of the automobile, it is held all other defenses are thereby waived. Where the insurance company knew of the character of the insured's title when the policy was issued, and again when proof of loss was made, and delayed to tender back the premium until two months after suit was commenced on the policy, the defense that the insured was not the sole and unconditional owner as conditioned by the policy was waived. Vulcan Insurance Co. v. Johnson (1920)—Ind. App.—128 N. E. 664.

Though an automobile fire policy provides that a change of ownership of the car, without the written consent of the insurance company, renders the policy void, and that agents of the company cannot waive any provisions of the policy unless such waiver is written upon the policy or attached

thereto, yet where the local agent of the company knew, before he issued the policy to A, that the automobile had been sold by A to B, it was held that the company was bound by such knowledge, and was estopped from setting up, as a defense to a suit upon the policy, the non-compliance of the plaintiff with these provisions of the policy. Commercial Union Assurance Co. v. Lyon & Kelly (1915) 17 Ga. App. 441, 87 S. E. 761.

§72a. **Incumbrances.**—A provision in an automobile insurance policy that if the property insured "be or become incumbered by a chattel mortgage," the policy shall be void, is valid; and if the insured so incumbers the automobile, the insurer has the right to insist that its liability under the policy became thereby terminated. The purchaser of an automobile by absolute sale who, to enable the seller to discount the purchase money note, subsequently executes an instrument in form a contract of conditional sale, which is recorded in the manner prescribed for chattel mortgages, thereby incumbers the automobile within the meaning of such a policy. Springfield Fire and Marine Insurance Co. v. Chandlee (1913) 41 App. D. C. 209.

In Cottingham v. Maryland Motor Car Insurance Co., (1915) 168 N. Car. 259, 84 S. E. 274, it is held that where an unincumbered automobile is insured under a standard fire policy and the insured thereafter gives a mortgage thereon which is canceled before the destruction of the car by fire, the cancellation of the mortgage revives the original status of the policy and puts it again in force. To the same effect Gould v. St. Paul Fire & Marine Insurance Co. (1919)—Wash. —177 Pac. 787.

CHAPTER IX.

Subrogation.

§73. **Subrogation of Company to Owner's Rights on Payment of Claim.**—An insurance company which has paid for damages to an insured automobile injured by the negligence of a third party is subrogated to all the rights of the owner of the automobile. Allen v. Arnink Auto Renting Co. v. United Traction Co. (1915) 91 Misc. (N. Y.) 531, 154 N. Y. Supp. 934. See also American Automobile Ins. Co. v. United Rys. Co., (1918), 200 Mo. App. 317, 206 S. W. 257.

When an insurance company has paid the insured for the loss which he has sustained by the theft of his car while it was in the custody of a repairer, the insurance company is subrogated to the rights of the insured and is entitled to maintain an action against the repairer in the name of the insured if the jury are satisfied that the car was left in the repairer's custody, and was stolen and damaged by reason of his negligence. Stevens v. Stewart-Warner Speedometer Corp. (1916) 223 Mass. 44, 111 N. E. 771.

An insurer which has paid the loss under a theft policy, and taken an assignment from the insured of all his right, title and interest in the automobile, may maintain a suit to replevin the car against one claiming to be an innocent purchaser thereof. Globe & Rutgers Fire Insurance Co. of New York v. Adams, (1921),—Mo. App.—, 230 S. W. 345.

An insurance company insured an automobile under a policy providing for subrogation. The machine was struck

and injured by a street car, the owner being personally injured at the same time. The insurance company discharged its liability under the policy and received an assignment from the owner of his rights for injury to the car. The owner afterwards recovered judgment against the street car company for his personal injuries. This judgment did not preclude a subsequent action by the insurance company under its assignment, as owing to the provisions of the policy providing for subrogation two causes of action arose out of the accident, and there was no splitting of causes of action which would render a recovery on one a bar to the other. Underwriters at Lloyds Insurance Co. v. Vicksburg Traction Co. (1913) 106 Miss. 244, 63 So. 425. In its opinon in the insurance company's action against the street car company, reversing judgment for the defendant, the court said: "Appellant had an equitable interest in the automobile at the time of the collision by reason of having written the policy of insurance. When it was damaged, then, by virtue of the contract of insurance and the article of subrogation, appellant had such an interest in the claim for damages. This interest became a right to sue at law when appellant paid to Mr. O'Neil (the insured) the amount owning him for loss under the policy and received from him assignment of his claim and was subrogated to his right to recover for damages. Therefore, when the suit was filed by Mr. O'Neil on December 16, 1909, against appellee, the cause of action for recovery for injuries sustained to his person was in Mr. O'Neil, and the cause of action to recover for damages to the automobile was in appellant. There were then two distinct causes of action, two separate rights to recover, in two different persons."

§74. **Same.**—An owner insured against loss by fire and damage by collision, who settled with the wrongdoer for damages to the automobile in a collision, giving a full and complete release, could not recover on the policy, which con-

tained a subrogation clause in the following terms: "If this company shall claim that the damage was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving payment." It appeared that shortly after the injury the insured offered to make an assignment of his right to an attorney for the insurance company, who refused to take it at the time for want of full authority to act for the company, and because reasonable time had not elapsed to make investigation of the injury. Immediately afterwards the insured filed the claim with the wrongdoer and settled. It was held that the insurance company had not waived its right to subrogation under the policy. Maryland Motor Car Ins. Co. v. Haggard (1914) Tex. Civ. App., 168 S. W. 1011. The time when the payment was to be made by the company was not specified in the policy; but a reasonable time would by law be given the company to make the payment of loss and call upon the insured to make the assignment of his cause of action against the wrongdoer. And it would become the duty of the insured, in order to perform his part of the agreement, to continue in a position to make it legally possible for him to make a legally effective assignment when called upon to do so within a reasonable time by the company.

A company which has insured a car against theft by a policy in force at the time of the theft of the car, which, when the theft was reported, paid the policy and took an assignment of all the interest of the owners of the car in the policy and a bill of sale to the car, may appear as claimant on sequestration of the automobile. Dawedoff v. Hooper (Tex. Civ. App. 1916) 190 S. W. 522.

An indemnity company insuring a bus line, which paid a judgment obtained by an injured person against the bus line, on which he was a passenger, and the driver of another

automobile, in an action in which both were found negligent and were held liable for this concurrent negligence, was held not entitled to be subrogated to the rights of the insured bus line against the other defendant. Adams v. White Bus Line (1921),—Cal.195 Pac. 389.

Where an insurance company had paid an owner in full a claim for injuries to an insured automobile in a collision with a street car, it brought an action in its own name against the street car company, it being the only party who had suffered any loss. As to whether or not, under the Alabama Code, the cause of action could have been prosecuted under these circumstances by the insurance company in its own name was mooted, but not decided. It was held that, as a matter of course, the company had the right to amend its complaint by adding as the nominal plaintiff the name of the owner of the car, and proceed with the cause as thus amended in the name of the owner for the use of the company. Birmingham Railway, Light & Power Co. v. Aetna Accident & Liability Co. (1913) 184 Ala. 601, 64 So. 44.

The owner of an automobile having a policy of insurance over it instructed a garage company to send for it to be stored at the garage. While the garage company's employee was taking it to the garage a collision occurred, damaging the car. The owner paid the garage company under protest for repairs and new parts necessitated by the collision, the money being furnished by the insurance company, and sued the garage company therefor for the use of the insurance company. It was held that the plaintiff was not required to prove the interest of the insurance company, as with that the garage company had no concern. The only effect of bringing the action for the use of the insurance company was to declare a use for that company. The action in this form operated merely as an estoppel on the plaintiff insured to deny, as against the company, the latter's right to the proceeds. Southern Garage Co. v. Brown (1914) 187 Ala. 484, 65 So. 400.

§75. **Same.**—In an action by a car owner to recover damages in the sum of $500 as a result of a collision of his car with a team of the defendant company, the defendant introduced, over the plaintiff's objection, a release executed by the plaintiff to the Aetna Accident & Liability Company, releasing and discharging that company from all liability under the policy of insurance on the car, for the damages which occurred on this occasion. This release was in consideration of the sum of $200, and further stipulated that the insurance company was subrogated to the amount of such payment to the right of recovery of the plaintiff for such loss or expense against the persons who caused or contributed to it. The rights of subrogation, therefore, as set forth in the release, were limited to the amount of the payment of $200. It was held that, in a case of this kind, where the owner has been reimbursed by the insurance company only partially for the loss suffered, and the latter thereby subrogated to the rights of the owner only to the extent of the payment of such partial loss, the right of action is in the owner, and he may maintain the suit in his own name. The question of the distribution of the proceeds of recovery in such cases is a matter concerning only the owner and the insurance company, and with which the wrongdoer is not concerned. The release therefore was held inadmissible for the purpose of showing that the plaintiff had entirely parted with his right of action and that he could not therefore maintain the suit. Wyker v. Texas Co. (1918) 201 Ala. 585, 79 So. 7. The court quoted from the opinion in Southern Ry. Co. v. Blunt & Ward, 165 Fed. 258, where the question was discussed in whose name the cause of action should be brought in cases of this character, where the owner was reimbursed by the insurance company only partially for the loss sustained, as follows: "If from the pleadings it appeared that the Transportation Mutual Insurance Company had paid to the plaintiff only a part of the loss, they would be jointly interested in the recovery from the indemnitors, Blunt & Ward, and the

plaintiff could maintain the action in its own name and recover the full amount of the loss. As to the amount paid by the insurance company, it would become a trustee for said company. If the insurance company had paid the plaintiff all of the loss, then this suit should be by the insurance company alone in the name of the railway company as the nominal plaintiff for the use of the insurance company. If only a part of the loss had been paid by the insurer, the insured would be entitled to the residue; and how the money recovered is to be divided between them is a matter which interests them alone, and in which the defendants are not concerned," Southern Ry. Co. v. Blunt & Ward (1908) 165 Fed. 258, quoted in Wyker v. Texas Co. (1918) 201 Ala. 585, 79 So. 7. See also Webb v. Southern Ry Co. (1916) 235 Fed. 578.

§76. **Assignment of Claims Under Policies.**—An action was brought in the New Jersey courts upon eight or nine different insurance policies, a copy of one of which was annexed and the others were said to be of like tenor and effect and to contain the same covenants, limitations and restrictions. The policies were on automobiles and the statement of claim showed the number of the policy and the amount insured in it and the loss upon it, but gave no other particulars either as to the name of the insured, the kind of machine insured or the nature of the loss. The plaintiff's claim was founded upon an endorsement upon the policy that the loss, if any, was first payable to the Colonial Trust Company and the Automobile Securities Company, the plaintiff, as their respective interests might appear. It was not alleged that the plaintiff was the owner of any of the automobiles, nor was there any statement as to what interest it had, if any, in any of them; nor did the statement allege anything as to the fulfillment by the insured of the terms of the policy in the event of loss, as to giving notice and proof, nor as to what the loss consisted of. It was held

that this did not sufficiently show a cause of action, and an attachment based on the policies was dissolved. Automobile Securities Co. v. Atlas Assurance Co., Ltd. (1919) 67 Pittsburgh Legal Journal, 303.

CHAPTER X.

Actions and Defenses.

§77. **Voluntary Settlements and Aids in Defense.**—The settlement by an insurance company of a small loss for which it was not liable with an insured who has by mistake applied for a policy other than that which he wished (an indemnity instead of a direct collision policy) will not estop the company from denying liability for a subsequent loss not covered by the policy. Browne v. Commercial Union Assurance Co. (1916) 30 Cal. App. 547, 158 Pac. 765. Action was brought on a policy insuring an automobile against theft and other perils. The policy was issued to a company, the Henley-Kemball Company, and to the plaintiff's intestate, as their interests might appear, and required written notice of loss or damage forthwith to the company or the authorized agent who issued the policy and a signed and sworn statement by the insured within 60 days thereafter, unless the time was extended in writing, stating the time and cause of the loss. The car was stolen. The time was never extended, and the insured, without having rendered a statement, died more than 60 days after the loss. The insurance company, however, nearly six months thereafter, paid the Henley-Kemball Company. which had also failed to render a statement, the amount of its insurable interest. The plaintiff now claimed that this payment operated as a waiver of any statement by his intestate, and that he was entitled to the amount of insurance, with interest. The car was in the pos-

session of the intestate under a conditional sale from the Henley-Kemball Company, by the terms of which a certain part of the purchase price had been paid in cash while the balance was payable by instalments. It was further provided that the conditional vendor should effect the insurance and pay the premium, which was to be added to the price, and upon the final payment of the entire indebtedness a bill of sale was to be given. It was contended by the insurance company that their relation was analogous to that of mortgagor and mortgagee under a policy made payable to the mortgagee as his interest may appear, and, their interests being several, the contract of insurance could be enforced by either to the extent of his rights in the property, and a settlement with one would not bar the rights of the other, if compliance with the condition precedent were shown. It was held, however, unnecessary to determine the nature or scope of the contract, for on the record neither party had any enforceable rights. The payment, therefore, was a mere gratuity, which did not operate as a relinquishment by the insurance company of the right in this action to insist upon a compliance with the terms of the policy. Navickis v. Fireman's Fund Insurance Co. (1920)—Mass.—126 N. E. 388.

An automobile indemnity policy contained the following clause: "No action shall lie against the company under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid in money by him after trial of the issue, in satisfaction of a final judgment, against him, nor unless such action is brought within ninety days after such judgment has been paid and satisfied as aforesaid." While the automobile was being used by a director and general manager of the insured corporation on his own business it injured a horse, whose owner sued the director, Rosenfeld. The corporation notified the insurance company of the action and requested the latter to defend it, which it failed to do. The insured then defended the suit, and employed counsel. On a trial there was a verdict and

judgment against Rosenfeld. The insured was not a party to the action. The insured paid the judgment and sued the insurance company for the amounts it had paid out on the judgment and in defending the suit.

The insurance company was held not liable. The court said: "It cannot be maintained that a stranger who voluntarily employs counsel and defends a suit for tort committed by the defendant is by reason of this, if unsuccessful, bound for the payment of the judgment against the defendant. When the Indemnity Company insured the Distilling Company and not Rosenfeld, the Distilling Company could not, by its voluntary act in defending the suit against Rosenfeld, add to the liability of the Indemnity Company, and thus make it indemnify Rosenfeld against the consequences of his negligence. If the Distilling Company had not defended the suit brought by Hazel against Rosenfeld, clearly there would have been no liability of the Indemnity Company for the payment of the judgment against Rosenfeld. To allow the Distilling Company, by its voluntary act of defending the suit, to bring within the policy a loss for which the insured would not otherwise be liable, would be to impose upon the insurer a risk it did not assume." Rock Springs Distilling Co. v. Employers' Indemnity Co. of Philadelphia (1914) 160 Ky. 317, 169 S. W. 730.

An insurance company is not estopped from asserting a breach of its policy by the insured by undertaking the defense of a negligence action against the insured, relying upon a false representation of the insured; nor, apparently, can the insured predicate an estoppel on the falsity of his own representation even though that is known to the insurer before the trial of the negligence action. Morrison v. Royal Indemnity Co. (1917) 180 App. Div. 709, 167 N. Y. Supp. 731.

§78. **Miscellaneous.**—In an action against an insured and his insurer, the trial court properly denied the applica-

tion of the defendant indemnity company to amend its answer to show that the automobile was not covered by the indemnity bond, the company offering to prove that the insured had sold the car covered some six weeks before the accident and purchased a new car which he was using at the time and which was not covered by the bond, the application not being made until the trial was almost completed and no claim being made that the company did not know the facts at the commencement of the trial. Ehlers v. Automobile Liability Co. (1919) 169 Wis. 494, 173, N. W. 325.

It is not a defense to an action on a fire policy, where the automobile was destroyed by fire, that the insured was negligent. White v. Home Mut. Ins. Assn. of Iowa (1920) —Iowa—179 N. W. 315.

In an action on an automobile fire policy evidence that the car was taken from the place where it was burned to the garage of the mortgagee of the car, and that it was afterwards disposed of, by whom the evidence did not disclose, and the evidence not showing that the local agent had any authority in the matter, was held properly excluded. Glaser v. Williamsburg City Fire Ins. Co. (1920)—Ind. App.—125 N. E. 787.

PART II

MATTERS PECULIAR TO THE DIFFERENT KINDS OF AUTOMOBILE INSURANCE

CHAPTER XI.

Fire Insurance.

§79. **Introductory.**—A policy insuring an automobile against destruction or damage by fire, theft, and the perils of transportation is, for pleading purposes at least, a fire policy nevertheless. Union Marine Insurance Co. v. Charlie's Transfer Co. (1914) 186 Ala. 443, 65 So. 78.

General reference is made to the preceding chapters, the majority of the cases cited in which are concerned with automobile fire policies.

§80. **Fire Originating Within the Car.**—An automobile fire policy contained the clause: "It is understood and agreed that this policy does not cover loss or damage caused by fire originating within the vehicle." It was held that the fair and natural import and meaning of the clause excluded loss by fire, danger of which was inherent in the use or operation of the automobile itself without the intervention of any outside cause or agency. When, therefore, the automobile was damaged by fire originating in an explosion of gasolene which, owing to the partial overturning of the automobile in a ditch containing water, ran out of its tank upon the water, and its vapor, coming in contact with the lighted lamps of the automobile, was ignited and exploded, causing the fire and the resulting damage, it was held that the fire originated within the vehicle, and that the policy did not

cover the loss. Preston v. Aetna Insurance Co. (1908) 193 N. Y. 142, 85 N. E. 1006.

§81. **Reporting Fire Losses—Dealer's Policy.**—A fire insurance contract with an automobile dealer consisted of the policy and of a rider or "slip," "Dealer's Form Automobile," dated November 24, 1915, apparently attached to the policy December 15, 1915, the time when the policy was dated, counter-signed and presumably delivered. By the terms of the policy and rider the contract covered automobiles held by the dealer for sale. A clause of the rider read: "All risks attaching hereunder are to be reported to this company as soon as known to the insured, but no risk to be binding unless so reported and accepted, and for which a certificate is issued signed by a duly authorized agent of the company." The clause further provided that: "It is understood and agreed that intentional failure to so report such risk as soon as known to the assured shall render this entire contract null and void."

In an action on the policy the plaintiff admitted that of the 19 automobiles damaged by a fire which occurred, at least 13 had not been reported "as soon as known" to him, the delay varying from 15 days to 17 weeks. It was held that there being no evidence from which compliance with these precedent conditions could have been found there could be no recovery for damage to the 13 automobiles. It was unnecessary for the court to decide whether the jury under suitable instructions could have found that either six or four of the 19 had been duly reported and certified. The plaintiff having offered no evidence that his failure to report the 13 automobiles "as soon as known" arose from unavoidable mistake or excusable inadvertence, and having acted voluntarily with full knowledge of the time when he acquired title to and possession of each automobile, was concluded by the second provision of the clause. Cass v. American Central Ins. Co. (1920)—Mass.—128 N. E. 716. The company never having prepared or provided a form of cer-

tificate for reporting losses as provided by the policy, it was held that the lists of automobiles claimed to be damaged in a fire which the insured gave to the insurer's general agents, who approved them, might be found by the jury to be a form of certificate which had been recognized by the company as sufficient.

In an action on a dealer's fire policy, issued February 8, 1919, the defense was that the insured had failed to comply with section 6 of the policy by reporting and making entries or certificates of the automobiles owned and for sale by them that had been destroyed by the fire. The insured alleged in reply that the policy declared upon was but a renewal of a previous one issued to the plaintiff by the company on February 8, 1918, and that at the time of the issuance of the 1918 policy, Phillip Kaufman, the local agent of the defendant company, orally agreed with a member of the insured company to go to the plaintiff's place of business from time to time, check the plaintiff's books and cars on hand, and make the necessary reports and certificates covering such cars as were insured, and cancel the insurance of such cars as the plaintiff had sold or otherwise disposed of; that the plaintiff's agent did so, but that on January 10, 1919, the defendant by its agents made entries on the passbook referred to in the policy or certificates covering six of the cars later burned, but by mistake omitted six of the cars later burned which had been reported. The question in the case was one of waiver; whether the company's agent could and did waive the requirements of paragraph 6 of the policy. The company is and was, at the times of the issuance of both policies, a California corporation, doing business in Texas, and evidently requiring the employment of agents in that state, Phillip Kaufman was its agent in the city of Abilene, and as such issued both policies. The court held that the evidence tended to show that at the time of the issuance of the 1918 policy Kaufman made the agreement to himself make the proper entries upon the passbooks or

certificates as an inducement to the plaintiffs to insure their automobiles in his company.

The Texas Court of Civil Appeals held, on the authority of Wagner & Chabot v. Westchester Fire Insurance Co. 92 Tex. 549, 50 S. W. 569, that the requirements of section 6 of the policy were waived by the company's agent, Kaufman. The court said: "It may not be amiss, however, to further say that Phillip Kaufman, under the terms of our statutes (V. S. Tex. Civ. Statutes, art. 4961) was an agent of the appellant company 'as far as relates to all the liabilities, duties, requirements, and penalties set forth' in the chapter of which the article is a part. The policy declared upon was issued by him, and the evidence shows it was in fact not forwarded to the company for approval. He knew or thought he knew the particular automobiles which it was his purpose to insure. Not only the policy in terms declares that it was its object and intent to cover, subject to conditions named in the policy, every automobile owned and for sale by the insured, but Phillip Kaufman testified that such was his purpose at the time of the issuance of the policy of February 8, 1919. We think the transaction must be construed as one in which the policy of 1919 was but a renewal of the policy of 1918, even though strictly and technically it should be construed otherwise, and that evidently the agents issuing the policy of February 8, 1919, had in mind the report and certificate made in November and January under the old policy, and therefore were content to make no further investigation. Under such circumstances, we think the issue of waiver presented by the appellees in this case must be maintained, and that the mistake of the agent in omitting from the certificates made on January 10, 1919, automobiles then actually on hand and later actually destroyed by the fire ought not to be made chargeable to the appellees." California Insurance Co. v. Bishop (1920)—Texas Civ. App.—228 S. W. 1010.

§82. **Care of Automobile by Insured After Damage.**—In an action on a policy over an automobile which was totally destroyed by two fires occurring a few days apart one of the defenses was failure and neglect of the insured to protect and safeguard the automobile from further damage after the first fire occurred. It was held that the insurance company could not thus defeat recovery, since the policy contained no clause requiring the insured to further safeguard the car after the first fire. St. Paul Fire & Marine Insurance v. Huff (1915)—Tex. Civ. App.—172 S. W. 755.

§83. **Valued Policies.**—Long prior to the enactment of the valued policy statutes valued policies were in use as the result of contracts. By a valued policy a valuation was fixed in advance by way of liquidated damages to avoid making a valuation after the loss had occurred. Such agreements have been uniformly upheld against the claim that they were wagering contracts; the construction put upon a valued policy being that the sum agreed upon was conclusive, both at law and in equity, save in cases of fraud. Daggs v. Orient Insurance Co. of Hartford, 136 Mo. 382, 38 S. W. 85. And where the automobile is insured at a sum so much beyond its worth that the gross overvaluation amounts to affirmative fraud upon the insurance company, this will avoid a valued policy. Hoffman v. Prussian National Insurance Co. (1918) 181 App. Div. 412.

§84. **Same; Depreciation in Value.**—From the decisions cited in the immediately following sections, it would appear that the sum stated in the policy is conclusive as to the value of the automobile at the date of insurance only, but not at the time of loss. This would seem to be the reasonable rule, so far as automobile insurance is concerned, as it is a well known fact, which both parties must be assumed to have had in mind when the insurance was effected, that automobiles depreciate in value very rapidly, even when not in active service. The point has not, however, been definitely decided.

§85. **Valued Policy Laws.**—The Missouri statute (section 7030, R. S. 1909), which provides: "No company shall take a risk on any property in this state at a ratio greater than three-fourths of the value of the property insured, and when taken, its value shall not be questioned in any proceeding," applies to insurance written on personal as well as real property, and therefore applies to automobile insurance. It appears to be something more than what is usually regarded as a valued policy statute, in that it carries an inhibition against every insurance company in taking a risk at a ratio greater than three-fourths of the value of the property. "Such being true, it estops the insurer, after the issuance of a valid policy, from disputing that the subject-matter of the insurance was of the value, at the time the policy was issued, not only equal to the amount of the insurance written thereon, but one-fourth more, as well." Farber v. American Automobile Insurance Co. (1915) 191 Mo. App. 307, 177 S. W. 675.

In this case the court also said, however: "It seems to be entirely clear that the statute is designed only to conclude the matter of the value of the subject of insurance stipulated in a policy contract fairly entered into with respect to such valuation. In other words, false and fraudulent representations of fact, not mere expressions of opinion, designedly made with sinister motive relative to the value of the property as an inducement to the contract of insurance fixing the valuation, if believed and acted upon by the insurer so as to cause the company to issue a policy considerably in excess of the true value of the property at the time, should be regarded not only as material to the risk but sufficient to render the contract void from its inception. In this view, such matter may be shown in defense notwithstanding the valued policy statute." The words "when taken" imply that the negotiations antecedent to the policy shall be honest and fair as to material matters, to the end that a valid contract as to value may be had.

The Missouri statute becomes a part of the policy and a defendant company is precluded from denying the value of an insured automobile at the time the policy was written. Wolff v. Hartford Fire Ins. Co. (1920)—Mo. App.—223 S. W. 810. The statute, however, goes no further than to establish conclusively the value of the automobile at the date of the policy. And, where the property insured is personalty of a changing character, which is subject to diminution or depreciation, such as an automobile, and the policy provides that the insurer shall not be liable beyond the actual cash value of the property at the time of the loss, the extent of the insured's demand and of the insurer's liability is, in the case of a total loss, the value of the property at the time of its destruction by fire, and this question of the value of the property at the time of the fire is open to dispute and litigation. And the burden is on the plaintiff to show the value of the property at the time of the fire. Strawbridge v. Standard Fire Insurance Co. (1916) 193 Mo. App. 687. In this case the court said that as between the parties in an action on a valued policy, "the value of the car, in respect of insurance, means its actual value as an instrumentality for continued use. If, through no depreciation inherent in the car itself by reason of the lapse of time, use, injury, or damage, the car, as an instrumentality for continued use by the insured, is worth as much or more than the amount claimed, the insurer cannot complain. He cannot add to that actual inherent depreciation the decrease in the price it would bring simply because it is not a new, but is now a used or second-hand car." In other words, the only diminution on the value, as fixed by the statute and the policy, "which could be considered in determining the loss for which payment can be demanded as insurance, is the inherent depreciation in the machine itself through use, injury, or damage, accruing to it *subsequent* to the date of the policy."

In an action on a Missouri fire policy for $2,000, it was

held correct to instruct the jury, in view of the valued policy law, that the automobile was worth $2,666.66 when insured; and that they should deduct from that amount any sum that they found the car had depreciated in value from the date it was insured to the date it was burned. Zackwik v. Hanover Fire Ins. Co. (1920)—Mo. App.—225 S. W. 135.

Where the insurer, by the terms of the policy, is not required to pay more than the value of the car at the time of loss, and the insured refuses to tell or discuss the value, but brings suit for the full amount of the policy less a small credit for the wreckage sold, so that the insurer cannot ascertain, without litigation, what the true condition and value at the time of the loss were, there is no room for the charge of a vexatious refusal to pay warranting the recovery of a penalty under the Missouri statute (Mo. Rev. Stat. 1909, 7068). Strawbridge v. Standard Fire Insurance Co. (1916) 193 Mo. App. 687.

Any provision in an automobile fire policy written since March 25, 1909, in conflict with the provision of the standard form of policy of the state of Oklahoma, provided by the Act March 25, 1909 and section 3482, Oklahoma Revised Laws 1910, will not be enforced by the Oklahoma courts. Section 3482 provides that the insurance company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall in no event exceed what it would then cost the insured to repair or replace the same in material of like kind and quality. The value of an automobile wholly destroyed by fire under an Oklahoma policy written since the 25th of March, 1909, cannot be fixed by the policy, but must be determined by the actual value of the car destroyed at the time of its destruction. When, in an action upon an Oklahoma fire policy in the sum of $3,000, for the destruction of the insured automobile by fire, the evidence was in conflict as to the value of the automobile destroyed, it was held reversible error for the court to instruct the jury that,

if they found for the plaintiff, they must find for the face value of the policy. The question of the value of the car should have been submitted to the jury. Palatine Insurance Co. of London v. Commerce Trust Co. (1918)—Okla.—175 Pac. 930.

§86. **Deterioration in Value; Evidence.**—An attorney at law who testified that he had "personally owned three machines during the period of the last five years, and have personally had the experience of having a machine wrecked, and I have been attorney for different automobile concerns and in that way keep in touch with the business," and that he had frequently ridden in the automobile in question, was held not qualified to testify as an expert on the question as to whether or not there was any deterioration in the value of the car between the time the policy was issued and the time of the loss. The court said: "One may own an automobile, or several of them, in fact, and yet never acquire any knowledge of the mechanism thereof, nor what parts thereof are subjected to the greatest amount of wear and tear; nor would mere ownership of an automobile necessarily give any knowledge of the relative value of a particular car at fixed dates; nor would the fact that one who had been the owner of several automobiles had ridden in a particular machine a number of times, without more, throw any light upon the question as to whether or not he possessed sufficient knowledge, skill, or information to qualify him as an expert upon such subject." Wolff v. Hartford Fire Ins. Co. (1920)—Mo. App.—223 S. W. 810.

In an unreported case in the federal district court for the Northern District of New York, McConihe v. St. Paul Fire & Marine Ins. Co., which was an action on a valued policy allowing the insurance company the option to repair, expert testimony was admitted to show that even if an automobile had never been used its cash value would have depreciated 25 per cent.

§86a. **Appreciation in Value.**—An automobile may appreciate, as well as depreciate, in value.

In a recent English case it appeared that a proposal form for the insurance of an automobile contained a table of rates based on the "full value of the car," but stated that cars under a certain price and horse-power could be accepted at a lower rate. Under the latter offer the car was insured in 1915, and under the heading "Particulars of Car," the insured filled in his "estimate of present value" as £250. By the policy the insurer agreed to indemnify the insured "to an amount not exceeding the full value of the car." The policy was renewed from year to year till 1919, when the car was detroyed by fire, the policy being still in force. The car had appreciated in value. It was held that on the last renewal of the policy the insured must be deemed to have renewed his estimate of the "present value" of the car as £250, and if at that date the car was worth more the insured could recover only that amount, but if all the increase in value took place after that date the insured was entitled to recover the full value of the car at the time when it was destroyed. Wilson v. Scottish Insurance Corporation, Limited, [1920] 2 Ch. 28; 89 L. J. (Ch.) 329; [1920] W. C. & Ins. R. 107; 123 L. T. 404; (1920) W. N. 169; 36 T. L. K. 545; 64 S. J. 514.

CHAPTER XII.

Theft Insurance.

§87. **Intent to Steal Necessary.**—It is well settled that there must be intent to steal to make an insurance company liable under a policy insuring against "theft, robbery or pilferage." One cannot be convicted of either theft, robbery or pilferage unless he had the intent to steal; and there is no authority for giving any different meaning to these words in a contract of insurance in which it is stipulated that the company will be liable for loss or damage to an automobile, resulting from theft, robbery, or pilferage. If the person taking the automobile had the *animus revertendi,* the intention to return it, he is not guilty of theft, or robbery, or pilferage, even though he took the machine without the owner's consent. Hartford Fire Insurance Co. v. Wimbish (1913) 12 Ga. App. 712, 78 S. E. 265; Michigan Commercial Insurance Co. v. Wills (1914) 57 Ind. App. 256, 106 N. E. 725.

The intent to steal is a necessary ingredient in all three offenses. Phoenix Assurance Co. v. Epstein, (1917) 73 Fla.

991, 75 So. 537, Hartford Fire Insurance Co. v. Wimbish *supra.*

Such a policy does not cover a loss where the automobile was wrecked while lawfully in the possession of an employee of a garage company, under instructions to deliver it to the owner, although the employee went out of his way in making the trip.. Stuht v. Maryland Motor Car Insurance Co. v. Wimbush (1913) 12 Ga. App. 712, 78 S. E. 265.

The fact that the person taking the automobile was guilty of a misdemeanor under the state "automobile act" would not authorize a recovery by the owner, if there was no showing of an intent to steal. Hartford Fire Insurance Co. v. Wimbish (1913) 12 Ga. App. 712, 78 S. E. 265.

An automobile insured against "theft, robbery, or pilferage" was taken from the owner's garage without his knowledge by persons unknown and returned in a damaged condition. The owner's statement of claim to the insurance company set forth a loss of $97.80, including for tools, $4.20; repair bill, $63.60; vulcanizing inner tubes, $5; damage to top and curtains, $25; and unearned premium, $6.50, (the insurance company having canceled the policy prior to its termination by its terms). It was held that the damage and loss were not within the terms of a policy providing against "theft, robbery, or pilferage"; that "pilferage" has but one meaning and is some form of stealing. Felgar v. Home Insurnace Co. of New York (1917) 207 Ill. App. 492.

§88. **"Joy Riding."**—It follows from what has been said that an owner cannot recover on a finding of facts showing that his automobile was wrongfully taken for the purpose of a "joy ride," but not disclosing any intention to steal it. Michigan Commercial Insurancce Co. v. Wills (1914) 57 Ind.. App. 256, 106 N. E. 725; Phoenix Assurance Co. v. Epstein (1917) 73 Fla. 991, 75 So. 537.

An automobile insured against loss resulting from theft was left in a paint shop by the owner to be repainted. Men employed in the shop appropriated it for the purpose of

taking a joy ride, in the course of which it was injured. It was held that the car was not stolen, and the insurance company was not liable under the policy. The fact that the taking was altogether wrongful and that it was the intention of the men to appropriate the car to their own use during the ride and to that extent to deprive the owner of the use of their property was not sufficient to constitute their acts larceny. They must have had a criminal intent—the intention to steal the car, to permanently deprive the owner thereof. Valley Mercantile Co. v. St. Paul Fire & Marine Ins. Co. (1914) 49 Mont. 430, 143 Pac. 559.

§89. **Intent Shown.**—An automobile dealer's employee, on being discharged because of dull business, borrowed an automobile from the dealer to search for employment, promising to return it in a day or two. After trying to sell it within the state (Kentucky) he drove it to Missouri, where it was found some six or seven weeks later in a remote part of the state in a badly battered and damaged condition. It was held that this was as effectual a conversion as if he had actually sold the machine and appropriated the proceeds. Federal Insurance Co. v. Hiter (1915) 164 Ky. 743, 176 S. W. 210.

In an action on an automobile theft policy, it was held that the evidence showed a theft with felonious intent where it appeared that a discharged servant of the plaintiff, whose duties in the plaintiff's employment did not include driving an automobile, unlocked the garage and put the batteries and other equipment on the car and drove it away without the owner's knowledge or consent, and the equipment was not on the car when it was returned by him in a damaged condition. Pask v. London & Lancashire Fire Insurance Co. (1915) 211 Ill. App. 271.

§90. **Taking by Trick or Device Not Covered.**—The ordinary theft policy does not cover larceny by trick or device, involving the deception of the insured. An owner

insured against direct loss or damage by theft, robbery or pilferage gave it into the possession of a corporation for the purpose of having it sold. In an action on the policy the complaint alleged that the corporation, pursuant to a conspiracy and with felonious intent, procured a large number of owners, including the plaintiff, to deliver them their automobiles for sale, and thereafter converted and stole the car. It was held that this complaint did not state facts sufficient to constitute a cause of action. The court said: "While this policy insures against 'theft,' it seems clear that it was not the intention of the parties to the contract of insurance to insure against larceny by trick and device; that is, theft, the commission of which involves, as an essential element, the deception of the insured, resulting in a surrender of the possession of his property. The term 'theft,' as used in this policy, does not include all forms of larceny recognized by law. It does not include a larceny perpetrated, as this was, under the form and guise of a business transaction, conducted by the insured himself." Delafield v. London & Lancashire Fire Ins. Co. (1917) 177 N. Y. App. Div. 477, 164 N. Y. Supp. 221.

If the insured, the owner of the automobile, was deprived of its possession by reason of an honest dispute with the taker as to his title and possession, the taker merely using a trick to obtain what he thought was his property, the insured's damages are not covered either by the direct terms or even liberal intendment of the policy. Rush v. Boston Insurance Co. (1914) 88 Misc. (N. Y.) 48, 150 N. Y. Supp. 457. The court said: "To recover under such a policy the insured must unquestionably show that the car was stolen. He has no cause of action against the insurance company, even though he has been wrongfully deprived of his property, unless he has been so deprived of his property feloniously. The criminal intent, however, in such cases must usually be gathered from the surrounding circumstances, and proof of the taking by trick and device would be suf-

ficient to allow an inference of felonious intent. Nevertheless, this inference would be completely rebutted if the insurance company can show that the taker of the car acted under an honest belief that he was entitled to the possession of it, and merely used a trick to obtain what he thought was his own property."

§91. **Mere Trespass Not Theft.**—A mere trespass will not render the insurance company liable under a theft policy. The wife of one A— was the owner of an automobile and gave her husband a power of attorney to sell it. He sold it to Bigus who took possession of it and fastened the doors of the barn where it was kept. He then insured the car against "direct loss by burglary, theft or larceny." Shortly afterwards A's wife, who had some difficulty with her husband, took the car from the barn and transferred it to another barn. Bigus notified the insurance company of the loss of the car, which could not be found, and he then brought suit on the policy. It was held that the policy only covered a felonious asportation or taking, and it was manifest that the taking shown was, at most, a trespass against which there was no insurance. Bigus v. Pacific Coast Casualty Co. (1910) 145 Mo. App. 170, 129 S. W. 982.

§92. **Conditional Sales.**—The owner of an automobile, insured against theft, robbery or pilferage, placed the car in a garage, under an agreement with the garage keeper that the latter should pay him a specified sum therefor, payment to be made after the garage keeper had sold the car. The garage keeper disposed of the automobile the same day for a less sum, and converted the proceeds to his own use. The insurance company was held not liable under the policy, under New York Sales Act, § 100, providing that, when goods are delivered to the buyer on sale or return, the property passes to the buyer on delivery. Siegel v. Union Assur. Soc. (1915) 90 Misc. (N. Y.) 550, 153 N. Y. Supp. 662.

A policy insured the owner of a motorcycle and one Arthur, "as interest may appear," against theft, robbery and pilferage, the owner having sold the machine to Arthur on a conditional bill of sale. Arthur left the state with the machine. He claimed that it had been stolen from him and gave notice to the insurance company. Arthur assigned his claim against the insurance company to the owner. The insurance company, after investigation, became satisfied that the machine had not been stolen from Arthur and denied its liability to the owner. In an action by the owner it was held he was entitled to recover the amount due and unpaid him for the purchase price. Neal, Clark & Neal Co. v. Liverpool & London Globe Ins. Co. (1917) 178 App. Div. 730, 165 N. Y. Supp. 204.

§93. **Special Contract as to Conversion.—Dealer's Policy.** —An automobile dealer, in conversation with the agent of an insurance company, who was seeking the dealer's business. told him that he desired to be protected in all cases of lease contracts. The agent promised that his company would fully protect the dealer if he would insure his automobiles with it, and stated, according to the dealer, that the policies of the company would be protection against "fire, theft, and wrongful conversion," and that he would have the company write the dealer to that effect. In accordance with this understanding, the company's secretary wrote the dealer on June 8, 1916. that the company would from that date extend policies on all cars in which the dealer had an equity to cover any claims arising under specified conditions, one of which was: "If the conditional buyer of an automobile, or any member of his immediate family, should steal any automobile insured under our policies, and thereby commit a felony, upon warrant being secured for the arrest of such party or parties, the company hereby agrees that your equity in any automobile insured by this company will be fully protected." This instrument was never recalled. The dealer sold a car

to a customer on installments and a policy was issued by the company on June 12, 1917, covering the parties' interests. On September 15, 1917, the vendee of the car disappeared from the neighborhood, taking the car with him. It was held in an action against the insurance company that the letter of June 8, 1916, and the policy constituted one contract; and that the letter became a part of every contract of insurance entered into between the parties after its date, unless expressly excluded from such contracts. The word "steal" was held to have been used by the parties in the above agreement in its broad and colloquial sense, to include embezzlement or wrongful conversion by the vendee, this being what the letter was given to protect the insured against. Conversion of the automobile was held shown by evidence that the conditional vendee took the automobile out of the state without the seller's knowledge or consent; that he concealed it, so that the seller could not locate it by the aid of detectives; and that installments on the price had not been paid since the date of the disappearance of the car. Buxton v. International Indemnity Co. (1920)—Cal. App.—191 Pac. 84.

§94. **Conversion by Bailee Not Covered.**—An owner brought suit for the value of an automobile under a policy protecting her against "theft, robbery or pilferage, excepting by any person or persons in the insured's household or in the insured's service or employment, whether the theft, robbery or pilferage occur during the hours of such service or employment or not." The evidence disclosed that the plaintiff had been induced to purchase the car, a second-hand one, by virtue of the representations of one Miller, an automobile mechanic, who at the time of the purchase was a lodger of the plaintiff; that shortly thereafter the car got out of order, and that the plaintiff stated to Miller, who in the meantime had removed from the plaintiff's residence, that it was "up to him to fix it"; that the car was turned over to Miller for such purpose under the statement quoted, and

without any understanding that Miller was to receive compensation for his services in repairing it. The evidence indicated that after the car had been entrusted to Miller he fraudulently converted it to his own use. Upon these facts a non-suit was granted, which was affirmed on appeal for the following reason: "Under the terms of such a policy, written to indemnify an owner against loss by 'theft, robbery or pilferage,' the usual and ordinary meaning of these words, involving the wrongful and fraudulent taking and carrying away of the article stolen, should have application, and the reasonable intention of the contract should not be extended to cover the fraudulent conversion by a bailee of the property so entrusted. The true and manifest intent and spirit of the contract should not be so technically construed as to require that it partake of the nature of a blanket fidelity bond guaranteeing the integrity of all such persons as may be entrusted by the owner with the possession and control of the article covered by the policy of insurance." Gunn v. Globe & Rutgers Fire Insurance Co. (1919) 24 Ga. App. 615, 101 S. E. 691.

§95. **Theft by Person in Insured's Employment.**—A usual exception in a theft policy is theft by a person in the insured's service or employment. A taking by such a person is not within the policy, and damage resulting from such taking is not covered. Phoenix Aussurance Co. v. Epstein (1917) 73 Fla. 991, 75 So. 537.

To be in the service or employment of the insured, within the meaning of such a policy, a person taking the automobile must have been subject to the control and direction of the insured and bound to render him personal service. The employee of a public garage keeper, at whose garage the car was kept, is not in the insured's employ, and the policy covers theft by such a person. Schmid v. Heath, (1912) 173 Ill. App. 649.

Where the insured automobile was stored in a garage belonging to a corporation of which the owner of the insured

car was president, evidence that the caretaker of the garage was implicated in the theft of the car, which was afterwards, while in his possession, wrecked in a collision, was held insufficient to establish that the damage was done by one in the employment or service of the insured within the meaning of the policy. Callahan v. London & Lancashire Fire Ins. Co. (1917) 98 Misc. (N. Y.) 589, 163 N. Y. Supp. 322.

Under a theft policy excepting theft by persons in the insured's household or service or employment it was held that the company was liable to the owner who had given the keys of his garage, in good faith, for the purpose of having his car washed, but without undertaking to pay anything for the service, to a chauffeur in the employment of another, who used the car for his own personal purpose, resulting in the wrecking of the car. Ouimet v. National Ben Franklin Fire Insurance Co. (1920) Que. C. R. 56 Dom. L. R. 501.

The question whether the automobile was or was not stolen by a person in the insured's employment may be a question for the jury. The salesman of a Detroit firm of automobile manufacturers, engaged in selling cars for his employers, was using a new car for demonstration purposes. The company gave the salesman special permission to take the car out in the evening, contrary to its usual rules, to demonstrate to prospective customers. He took the customers for a ride, and left the car in front of a hotel for twenty minutes. When he returned it was gone. In an action on a theft policy it was held error to direct a verdict for the plaintiff. The evidence of theft was purely circumstantial and the fact that some one in the plaintiff's service had no guilty participation in the disappearance of the car was not indisputably established. The jury might infer from the circumstances, the delay of the salesman to report the loss till next morning, giving the thief a start of ten or twelve hours, that he was privy to the taking of the car, or that he was innocent. The credibility of the salesman and the bona fides of his conduct with reference to the theft were issues

for the jury. Kansas City Regal Auto Co. v. Old Colony Ins. Co. (1915) 187 Mo. App. 514.

§96. **Theft by Person in Insured's Household**—Theft by a member of the insured's houshold is also usually excepted from the risks insured against. The theft of an insured automobile by the owner's nephew, while the nephew was residing with the insured as his guest, falls within the exception of theft by "any person or persons in the assured's household, or in the assured's service or employment." While such a policy was in force the insured's nephew, about 18 years of age, came to his uncle's house in Baltimore on February 3, 1919, for a visit, the prospective duration of which was not disclosed. Some time during the night of February 7th, the nephew went to his uncle's bedroom while the latter was sleeping, took the switch key of the automobile from his uncle's pocket, went to the garage where the automobile was stored, and by misrepresentations (that his uncle was dying and it was necessary to fetch a doctor) induced the watchman to take it out. He drove the car to Alexandria, Va., where he sold it. He was subsequently arrested and pleaded guilty to larceny of the car in Baltimore. The car was discovered several days after the theft in a garage in Alexandria. It was not in running order and bore evidence of severe usage. The insured took possession of it, had temporary repairs made, brought it to Baltimore, sold it for $1,200, though it had cost him $2,120, and claimed of the insurance company as a loss under the policy the difference between the initial cost of the car, plus repairs and the selling price.

The trial court held that under the language of the policy the insurance company was not liable and the automobile was excepted from the policy. Judgment for the insurance company was affirmed, the court saying that the object and purpose of an exception such as this is "to guard the company against liability for such thefts as we have in this case, and to prevent fraud and collusion by and between the assured and persons in a household or in the assured's services or

employment." Rydstrom v. Queen Insurance Co. of America. (1921)—Md.—112 Atl. 586.

§97. **Time for Reporting Loss by Theft.**—The time for rendering statement of loss commences to run from the time of theft, and not from the time that the insured discovered it. But the insurance company may waive the requirement as to rendering the statement by denying liability before the expiration of such time. Neal, Clark & Neal Co. v. Liverpool & London & Globe Ins. Co., (1917) 178 App. Div. 730, 163 N. Y. Supp. 204.

§98.—**Theft of Equipment.**—A provision in a theft policy "excepting in any case other than in case of total loss of the automobile described herein, the theft, robbery or pilferage of tools and repair equipment" does not mean that the company is only liable for the whole automobile when there is a total loss, but means that the company is only liable for the loss of the tools when there is a total loss of the automobile. Ouimet v. National Ben Franklin Fire Insurance Co. (1920) Que. C. R. 56 Dominion L. R. 501; See also Pask v. London & Lancashire Fire Insurance Co. (1915) 211 Ill. App. 271, § 96 supra.

§99. **Proof of Theft.**—Theft must be determined by the facts attending the taking of the automobile. The mere statement of a witness in a civil action concerning an insured automobile that the car "was stolen" is insufficient. Federal Insurance Co. v. Munden (1918)—Tex. Civ. App.—203 S. W. 917.

An action to recover under a policy of automobile insurance against theft is a civil action, and the plaintiff is required to prove his case only by a preponderance of the evidence; the rule being the same as it is in civil cases generally. Buxton v. International Indemnity Co. (1920)—Cal. App.—191 Pac. 84; but, to recover at all, he has the burden of proving every element of the crime of larceny. Valley Mercantile Co. v. St. Paul Fire & Marine Ins. Co., (1914) 49 Mont. 430, 143 Pac. 559; Phoenix Assurance Co. v. Eppstein (1917) 73 Fla. 991,

75 So. 537 (where the evidence adduced by the plaintiff, not detailed in the opinion, was held not to measure up to this requirement). The failure of the insurance company to offer any evidence in rebuttal of the plaintiff's evidence as to theft does not alone warrant the direction of a verdict for the plaintiff. Kansas City Regal Auto Co. v. Old Colony Insurance Co. (1915) 187 Mo. App. 514. Where the evidence does not conflict, the question of whether the car was stolen is for the court. The following testimony for the plaintiff, being undisputed, was held insufficient to take the question of the theft of an insured car to the jury. It appeared that the plaintiff (the insured) was out of the city where he lived and had left the car in charge of a third party; that the latter had used it on the day in question, and parked it near his office, and on his return later it was gone. Judgment for the plaintiff, on a directed verdict, was affirmed. Stone v. American Mutual Auto Insurance Co. (1921)—Mich.—181 N. W. 973. In this case it appeared that after the loss the plaintiff (the insured) had assigned his right to recover therefor to the party who had charge of the car, but a reassignment had been made to the plaintiff before suit was brought. This party was cross-examined as to these transfers, and after stating that the plaintiff owed him $800 at the time the transfer was made, he was asked: "What was that for?" To this an objection was interposed and sustained. The reason assigned by counsel for its materiality was: "This witness was very closely associated with the disappearance of this car." It was held that the matter was collateral to the issue presented and that there was no prejudicial error in the ruling of the court.

Where there is at least prima facie evidence of theft, it is error to direct a verdict for the defendant. In an action on a theft policy the plaintiff proved that he, accompanied by two friends, drove the automobile aboard a ferryboat crossing the Hudson river from Englewood, N. J., to Dyckman street, N. Y. He placed the machine close up to the front of the boat, put on the emergency brake and stopped the engine. He

and his friends then went into the cabin before the boat started. There was no other vehicle on the boat on that trip. Some minutes later, and when the boat was out on the river, they all came out and found the machine gone, the chain at the rear of the boat lying loose on the deck, and the gate at the rear half way open. It was held that these facts were prima facie proof of theft, and a directed verdict for the defendant was reversed and a new trial granted. Chepakoff v. National Ben Franklin Fire Ins. Co. (1916) 97 Misc. (N. Y.) 320, 161 N. Y. Supp. 283

See as to proof of conversion Buxton v. International Indemnity Co. (1920)—Cal. App.—191 Pac. 84, Supra. § 93.

§100. **Cars Recovered After Theft.**—This type of insurance being indemnity insurance, the company is only required to make the insured whole in case of loss under the policy rather than pay the face of the policy, and where the car has been recovered the plaintiff must receive it back on payment by the company of all damages caused by the theft, if offered prior to the time stipulated for payment of the loss. Kansas City Royal Auto Co. v. Old Colony Ins. Co., (1917) 196 Mo. App. 225, 195 S. W. 579; Callahan v. London & Lancashire Fire Ins. Co., (1917) 98 Misc. (N. Y.) 589, 163 N. Y. Supp 322.

But an insurer does not discharge its obligation by notifying the insured owner of a car stolen in Kansas City that the car is in a garage at Peoria, Ill., and offering to turn over the car to the owner there and, in addition, to pay all damages caused by the theft. Plaintiff is thus without knowledge of the damages to the car, of what liens may have been created against it since the theft, the exact cost of returning it to Kansas City, or the time that would be lost in having it returned. The car need not be returned to the exact spot where it was stolen, but it should be brought to a place in the city where it was stolen where the owner may conveniently receive it. The return of the car to the city where it was stolen may be waived by the owner. Such waiver

must be shown by clear and distinct evidence. Kansas City Royal Auto Co. v. Old Colony Ins. Co., (1917) 196 Mo. App. 255, 195 S. W. 579

A theft policy gave the insurance company 30 days after proof of loss in which to make payment. Before the expiration of the 30-day period the insurer and insured adjusted the loss, the company drawing a draft for the amount and delivering it to the insured. Next day it stopped payment, on information that the car had been found. It was held that the transaction did not amount to an account stated so as to permit of an independent action thereon. The court said:

"No rights of third persons intervened and the defendants had the right. when the automobile was found, being prior to the expiration of the 30 days, to stop payment of the draft. It stands to reason that if the stolen property is found before the defendants are in default of their liability to pay for it, they should not be bound unless some new binding contract has arisen between the parties. In the absence of evidence to the contrary, and as a practical matter, we must assume that the parties to the adjustment and the draft acted with the understanding that if the automobile was found before the draft was paid, the liability for indemnity then automatically ceased." Frost v. Heath, (1918) 211 Ill. App. 454.

In an action on a theft policy it was held that the contention of the insurance company that it conclusively appeared that there was no abandonment of the automobile to the company was not sustained by the evidence (not detailed in the opinion); that in the view most favorable to the company it was a qustion of fact which the company did not ask to have submitted to the jury. Foote, J., dissented upon the ground that up to the time the stolen car was found and recovered, the insured had not abandoned the car to the company, but was entitled to claim the car as his property had he deemed it for his interest so to do; if he had this right, then the company had an equal right to restore the car to the insured. More v. Continental In-

surance Co., (1915) 169 App. Div. 914, affirmed 222 N. Y. 607; Radice v. National Fire Insurance Co., (1920) 190 App. Div. 893, following, without opinion, More v. Continental Insurance Co., supra.

In an action on a theft policy, evidence that the insured purchased a new automobile shortly after the theft was held not relevant to the issue. O'Connor v. Maryland Insurance Co. (1919) 287 Ill. 204, 122 N. E. 489

§101. **Time Within Which Recovered Car Must be Taken Back.**—The owner of an automobile insured it against theft for one year from March 31, 1916, through an agent of the insurance company. On Sunday evening, September 10, 1916, he left the car at the corner of La Salle and Randolph streets, in Chicago, while he went to a near by restaurant, asking a street railway employee to watch it. A few minutes thereafter a young man jumped into the car, unlocked it and drove away. The next day the insured went to the insurance company's agent's office and reported his loss and also sent a letter detailing the circumstances. About five days afterwards the insured bought a new car, giving his note therefor and assigning the policy to the company from which he bought the automobile as collateral security for the note. On November 15, 1916, the Chicago police department notified the insured that they had recovered the stolen car, and he accompanied a police officer to a down-town garage, where he identified it as the car which had been stolen from him. He refused, however, to take it, on the ground that he was entitled to the insurance money under the policy and that the car belonged to the insurance company, and he wrote the company to that effect, stating that he intended to use the money from the policy to pay off the note given for the new car. The company refused to pay the policy, on the ground that the car had been recovered, and that the insured could have it if he desired. The insured brought suit for a recovery under the policy on February 21, 1917. The car was insured for an amount not exceeding $1,375 against loss by fire, and also "against loss or damage by theft or robbery by any per-

son or persons other than those in the employment, service or household of the insured." The policy provided that the company, in case of loss or damage, should be liable only for the actual cost of repairing or replacement with the addition of the words "but there can be no abandonment to this company of the property described" and providing also for notice and protection from further loss or damage by the insured. The last provision of the policy, particularly necessary to be considered in connection with the case, read as follows: "The sum for which this company is liable pursuant to this policy shall be payable sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company." The Chicago Municipal Court directed a verdict in the insured's favor for $1,375 and costs.

On account of the importance of the questions involved the Illinois Appellate Court, after affirming the judgment for the insured, certified the case to the Illinois Supreme Court, which affirmed the Appellate Court's judgment for the following reasons: "There can be no question that on principle the theft of an automobile insured against theft and subsequently recovered presents a case somewhat analogous to the capture of an insured ship in time of war which is subsequently recovered from the enemy and restored to the owner."

"Abandonment, in its technical sense, means the relinquishment of a right; the giving up of something to which one is entitled; the giving up of a thing absolutely, without reference to any particular person or purpose. In maritime law it means relinquishment to the underwriters of all claim. Time is not an essential element of abandonment. The moment the intention to abandon and the relinquishment of possession unite the abandonment is complete. Abandonment is not necessary when the loss is actually total, nor can the abandonment be made unless the loss is constructively total. It is never obligatory upon the insured but operates only as a voluntary transfer of title."

It was held to be manifest from the provisions of the policy above mentioned that it was intended there should not be any voluntary abandonment by the insured to the company, using that word in its technical sense, but it was also considered apparent from reading and construing the provisions of the policy together that it was intended that there could be no recovery for a total loss of the automobile if the insurance company desired to replace the property on giving, in accordance with the terms fixed by the policy, the required notice. The policy also provided that the sum for which the company was liable should be payable in sixty days after notice and satisfactory proof of the loss. While there could be no question that the liability of the company might be affected by the return of the automobile and the giving of the required notice before the expiration of the sixty days, the court was disposed to hold that if, after the notice and satisfactory proof of loss were given, sixty days had expired before the finding and return of the automobile, the policy intended that there might be full recovery from the company for the value of the automobile, and this without reference to the question of abandonment. As the court construed this policy as to loss by theft, the term "abandonment," as used in the quoted provision, was intended to mean that there could be no voluntary abandonment (using the word in the technical sense) by the owner before the expiration of the sixty days.

"This suit was instituted after the lapse of sixty days from the notice and proof of loss, but after the automobile had been found. Counsel for appellant, (the insurance company), seem to concede that if the suit had been instituted before the automobile had been found, under the reasoning of the English cases, the insured could have recovered for the full amount of the machine,—that is, that the date of the starting of the suit fixed the time of recovery for a total loss if the machine had not been found before that date. Obviously, in order to make an insurance policy of this kind of value to the owner of the property there must be some time fixed

after which the return of the automobile will not release the company from liability. Automobiles are so generally used in business affairs and other activities of life that public policy requires that a person having a theft policy should not be compelled to wait indefinitely on the chance of having the stolen automobile recovered or be compelled to incur the expense of buying a new one and thereafter taking the old one back if recovered. Fairly construed, we think, this insurance policy intended to fix the date at sixty days after the notice and satisfactory proof of loss had been received by the company,—in other words, to fix the date at which the insured would not be compelled to take the stolen car back, even if recovered, at the date when the insurance money was agreed to be paid." O'Connor v. Maryland Motor Insurance Co., (1919) 287 Ill., 204, 122 N. E. 489.

§102. **Extent of Loss by Theft.**—The proper construction of a policy insuring against damages directly resulting from theft, robbery or pilferage is that "it covers all damages resulting, or which, in the contemplation of the parties, might result, from theft, which would include damages caused by reckless driving or handling of the car and storage of the same, or any use which destroyed its value in whole or in part. If, following the theft, the car should be recovered intact, in the same condition it was before the theft, the plaintiff's only damage would be expenses incurred in recovering the car, and, perhaps, in addition, the value of its use during the period between the theft and the recovery of the car. If the car were damaged or destroyed while in the custody of the thief, the plaintiff's damage would include also the diminution or loss of value of the car thus stolen." If the car should be wrecked by collision after the theft and totally destroyed, the defendant would be liable for its value. Callahan v. London and Lancashire Fire Ins. Co. (1917) 98 Misc. (N. Y.) 589, 163, N. Y. Supp. 322.

A policy "against loss or damage if amounting to $25 or more on any single occasion by theft, robbery or pilferage"

provided in another part of the policy that " in the event of loss or damage under this policy, this company shall be liable only for the actual cost of repairing, or, if necessary, replacing the parts damaged or destroyed." It is held that, notwithstanding the latter clause, diminution in the value of an automobile stolen and abandoned in a damaged condition is within the policy. Federal Insurance Co. v. Hiter, (1915) 164 Ky., 743, 176 S. W. 210.

Under a theft policy expressly providing that any act of the insured in recovering, saving and preserving the property, in case of loss or damage, shall be "considered as done for the benefit of all concerned, * * * and all reasonable expenses thus incurred shall constitute a claim under this policy" an insured may recover the amount paid a detective agency in attempting to recover the automobile after its theft. Buxton v. International Indemnity Co. (1920)—Cal. App.—191 Pac. 84.

Under a policy protecting a dealer's equity in automobiles sold under conditional contract and converted by the conditional vendee, an insured was held entitled to recover the amount of the unpaid installments, plus interest thereon, the conditional contract providing for payment of interest on all deferred payments from the date of contract. Buxton v. International Indemnity Co. (1920)—Cal. App.—191 Pac. 84.

§103. **Unauthorized Change in Contract.**—An application for a theft policy with a mutual insurance association was made when the association was insuring cars against theft throughout the state of Nebraska, including the city of Omaha, but between that date and the issuance of the policy it adopted an amendment to its by-laws, declaring that "theft insurance under any policy shall stand suspended and the association will pay no theft loss when the car is left standing unattended on the streets, in the parks or other public places in any of the following towns." including in the list Omaha. In writing up the policy, the association, without notice to the applicant and without authority from him included this provision in the alleged copy of the application. The applica-

tion, providing for insurance for one year from January 8, 1918, was approved by the secretary of the association January 14, 1918. Some days later the association issued its policy to the applicant and sent it to their local agent, who held it for the applicant until after the loss of the car by theft in Omaha on January 24, 1918. The loss was duly reported to the company, which repudiated liability, relying on the quoted exemption and a provision in the application that the applicant agreed to be "governed by the articles of incorporation and by-laws now in force or hereafter made by the association." It was held, in an action on the policy, that this provision did not authorize the association to insert in the copy of the application embodied in the policy the quoted clause not contained in the original application without the insured's knowledge; the provision giving the association no authority to make any essential changes in the contract obligation during the life of the policy. Johnson v. Home Mut. Ins. Assn., (1921)—Iowa—181 N. W. 244.

CHAPTER XIII

Collision Insurance

§104. **In General.**—Until the advent of the automobile, insurance against collision was practically, if not wholly, confined to marine insurance. There are many decisions in that branch of insurance law determining when vessels are in collision, and these are sometimes cited in automobile insurance collision cases. But the marine insurance holdings are far from uniform; and, so far, the same may be said of the rapidly growing number of automobile insurance collision cases. Universal Service Co. v. American Insurance Co. of Newark, N. J. (1921)—Mich.—181 N. W. 1007.

§105. **Distinction Between Collision and Accident Policy.**—A collision policy is not necessarily an accident policy, at least if it is not expressly so stated in the policy. A collision policy in the ordinary terms contained no reference to accidents. In an action on the policy it was held prejudicial for the trial court to instruct the jury "that if you shall find and believe from the evidence that the defendant did insure plaintiff herein against the loss or damage by accident as alleged in petition filed in this case, and plaintiff sustained such loss or damage by accident as alleged in said petition, during the life of said policy of insurance, then your verdict must be for the plaintiff." "It will be noted," the court said, "that the

policy did not insure plaintiff against loss or damage by accident, and that something more was necessary to entitle plaintiff to recover other than his merely sustaining a loss or damage by accident, namely, it was necessary that the damage be sustained by being in collision with another automobile, vehicle or object. The owner of an automobile insured by a policy of this character may suffer damage by accident in a great many ways that cannot constitute damage by collision, and which would not entitle him to recovery. The instruction purports to cover the entire case, and to direct a verdict, and that therefore said error is prejudicial, and could not be cured by other instructions given, needs no citation of authorities." Rouse v. St. Paul Fire & Marine Insurance Co. (1920)—Mo. App.—219 S. W. 688.

§106. **Collision "With Any Object."**—The courts have found considerable difficulty in the construction of the words "with any object" in collision policies, and references to this phrase will be found, not only in this section, but in the cases in the immediately succeeding sections.

Injury caused by running one of the wheels of the car into a hole six or seven inches deep and eighteen inches wide between the car tracks on a city street is not within the meaning of a policy insuring against damages from "collision with any object." Dougherty v. Insurance Company of North America (1910) 19 Pa. Dist. 547, 38. Pa. Co. Ct. 119.

The burden is upon the plaintiff to prove a collision within the terms of the policy.

An automobile insured against injury resulting from collision with some "object, either moving or stationary," was injured while running along a road in New Jersey. The side of the road sloped from the edge of the macadam roadbed at an angle of 30 to 45 degrees into a deep ditch. At a turn in the road the machine met a horse and wagon approaching from an opposite direction. The automobile turned out of the road upon the side of the ditch, the hind wheels skidding on the turn, thus throwing the rear of the machine further into the ditch than the front wheels. In attempting to regain

the road the right hand front wheel collapsed and the automobile turned over twice, and was seriously damaged. In an action on the policy proof was given of the above facts, and the trial court inferred that there must have been a collision. There was no evidence given of the existence of any object with which the automobile did or could have come into collision. On appeal the court said that if it were to speculate upon the causes of the injury to the car, the facts pointed more strongly to the collapse of the wheel from strain than from collision. It was shown that the earth was soft on the side of the ditch, and the wheels that left the road sank three or four inches into the earth. The spokes of the right front wheel were all broken off at the hub. The tire was intact. As the machine was tipped to the right by the slope of the bank, the weight would largely rest upon that wheel.. The skidding of the rear wheels would place a great strain upon the right front wheel, sunk three or four inches in dirt. The condition of the front wheel would seem to negative the theory of collision. Could the tire withstand a blow so violent as to break every spoke on the wheel? The trial court should not have speculated on the cause of the collapse of the wheel. That should have been proved. Hardenbergh v. Employers' Liability Assur. Corp., Ltd., (1913) 80 Misc. (N. Y.) 522, 141 N. Y. Supp. 502, reversing Hardenbergh v. Same, 78 Misc. (N. Y.) 105, 138 N. Y. Supp. 662.

In an action on a policy insuring automobiles against loss from damage "resulting from the collisions of said automobiles with any other automobile, vehicle or object, excluding * * * damage resulting from collisions due wholly or in part to upset," the insured claimed that the automobile was injured by a collision with a "brick, stone or other solid substance." The insurance company contended that to constitute a collision both objects must be in motion, and cited several marine insurance cases holding this to be the meaning of the word. It was held that the word "collision" was not to be limited to cases where both colliding objects were

in motion. Lepman v. Employers Liability Assurance Corp., Ltd., (1912) 170 Ill., App. 379. The court said. "If it had been the understanding of the insurer that its liability would be limited to those cases where there was a striking of the automobile and a moving object, the word 'moving' would doubtless have been placed before the word 'object.'"

In a case in the Illinois Appellate Court, not fully reported, a judgment for the plaintiff was reversed where the evidence showed that the insured automobile was not, as alleged, at the time in question in collision with any post or any other stationary object. Cantwell v. General Accident Fire & Life Assur. Corp. (1917) 205 Ill. App. 335.

§107. **Upsets Excluded.**—In an action on a policy insuring an automobile "from collision with any moving or stationary object; excluding however * * * (c.) damage resulting from collision due wholly or in part to upsets," it appeared that the automobile ran off a highway bridge, crashing through the guard rail, was precipitated into the stream below, turned upside down after leaving the bridge and rested in an inverted position on the bed of the stream. The trial court directed a verdict for the defendant. On appeal it was held that the plaintiff was entitled to damages unless, within the meaning of the policy, the moving or stationary object must be perpendicular instead of horizontal. There were no words in the policy limiting the meaning of the object to a perpendicular one. It was held that the liability seemed to be within the express terms of the policy. But, assuming that there was such ambiguity in the terms of the policy as would make it at least doubtful as to whether collision with water and land, horizontal objects, was within the terms of the policy, the words used in the policy would be interpreted most strongly against the insurer where the policy was so framed as to leave room for two constructions.

On the question of upset, the court said that it could not be said that the collision of the automobile with the water and land under the water was caused by an upset. "It may

be that the car upset by reason of contact with the water or the earth, but the collision was not due to an upset—the upset may have been the result of the collision. The provision in the policy cannot mean that where collision has first taken place, there can be no recovery because, as the result of the collision, the machine is upset. When the car ran off the bridge, dynamic force and gravitation determined the position in which it would strike first the water and then the bed of the stream. Its final position was merely incidental to the collision." Judgment for the defendant was therefore reversed and a new trial ordered. Harris v. American Casualty Co. of Reading, Pa., (1912) 83 N. J. L. 641.

An automobile was insured against loss "by being in collision during the period insured with any other automobile, vehicle or object, excluding * * * damage caused by striking any portion of the roadbed or by striking the rails or ties of street, steam or electric railroads." While the automobile was being used by an agent of the insured for pleasure riding at night, the agent by accident ran it off the main road and down a bank of three or four feet into a river, damaging the car. It was held that the accident was not within the policy, was "so obviously outside of the quoted stipulation of the policy that discussion seems superfluous. In order to bring the case within the policy there must have been, first, a collision; second, the collision must have been with another automobile, vehicle, or somewhat similar object, *ejusdem generis;* and third, it must not have been with any portion of the roadbed, meaning the ground on which the machine was running or attempting to run. No such collision was shown as that insured against." Wettengel v. United States "Lloyds" (1914) 157 Wis. 433, 147 N. W. 360. The court distinguished the case of Harris v. American Casualty Co., 83 N. J. Law, 641, *supra,* where the policy was different, adding that it was disposed to doubt the soundness of that decision even upon the different contract there in question. In the later case of Bell v. American Issurance Co. (1921) Wis. 181 N. W. 733, the Wisconsin Supreme Court said, referring to the

Wettengel case: "A further consideration of the subject does not remove the doubts there expressed."

In Bell v. American Insurance Co., *supra*, it is held that the striking of the ground, resulting from one side of the car settling into the ground and the car tipping over, is not a collision within the meaning of such a policy. An insured was driving his automobile down a street and turned on an avenue with the intention of backing out and turning around. He had crossed the cross-walk by six or eight feet, practically stopped his car, the power being in neutral, preparatory to backing out. One side of the car gradually settled into the ground and the car tipped over. The insured sued the company to recover the damage to the car by its coming into contact with the ground at the time of the upset. Bell v. American Insurance Co., (1921)—Wis.—181 N. W. 733. The court said: "With the definitions of lexicographers as a basis, it is easy to demonstrate that the incident resulting in damage to plaintiff's automobile constituted a collision. Thus:

"A collision is the meeting and mutual striking or dashing of two or more moving bodies or of a moving body with a stationary one." Century Dictionary. "Object" is defined to be "that which is put, or which may be regarded as put, in the way of some of the senses, something visible or tangible." Webster's Dictionary. An automobile is an object. Upon the overturning of an automobile its forcible contact with the earth constitutes a "mutual striking or dashing of a moving body with a stationary one." Hence the forcible contact of the automobile with the earth on the occasion of the upset constituted a collision.

"Upon its face this appears to be good logic, but the conclusion is neither convincing nor satisfying. One instinctively withholds assent to the result. The reason is that it makes a novel and unusual use and application of the word 'collision.' We do not speak of falling bodies as colliding with the earth. In common parlance the apple falls to the ground; it does not collide with the earth. So with all falling bodies. We speak of the descent as a fall, not a collision. In popular

understanding a collision does not result, we think, from the force of gravity alone. Such an application of the term lacks the support of 'widespread and frequent usage.'"

"The incident causing the damage to the automobile here in question is spoken of in common parlance as an upset or tip-over. If it were the purpose to insure against damage resulting from such an incident, why should not such words, or words of similar import, have been used? We cannot presume that the parties to the contract intended that an upset should be construed as a collision in the absence of a closer association of the two incidents in popular understanding."

Under a policy expressly covering damage to the automobile "if caused solely by collision with another object, either moving or stationary" and excluding all damage caused by upset unless such upset is a direct result of such a collision, there is no recovery for damage to a car which, in coming down a steep grade at a high rate of speed, got out of the road on a sharp turn and upset on the brink of a hill without colliding with anything and rolled down the hill and there collided with a tree. Stuht v. United States Fidelity and Guaranty Co., (1916) 89 Wash. 93, 154 Pac. 137.

§108. **Collision with Roadbed Excluded.** — A collision policy covered damage to the car by being "in collision with any other automobile, vehicle or object * * * excluding damages caused by striking any portion of the roadbed."

The word "object" as used here does not, it is held, mean "some object similar to an automobile or vehicle," within the *ejusdem generis* rule, but must be construed in the ordinary acceptance of the word to imply that which is tangible or visible. Under this definition it was held that an embankment outside the traveled road which the car hit after it had skidded and overturned and was rolling into the ditch at the roadside was within the policy. The court refused to consider the embankment part of the roadbed, and so excepted by the policy, holding that the term "roadbed" applies only to that portion of the road which was constructed

and used for travel. Rouse v. St. Paul Fire & Marine Insurance Co., (1920)—Mo. App.—219 S. W. 688.

A policy insured against loss "by collision with another object, either moving or stationary, excluding, however, * * * all loss or damage caused by striking any portion of the roadbed or any impediment consequent upon the condition thereof." In an action for damage by collision with the curbing along a street it was held that if the curbing was a part of the street or roadway, the plaintiff could not say that he had left the roadbed when he collided with the curbstone. A curbing or curbstone along a street was held to be both a "portion of the roadbed" and an "impediment consequent upon the condition thereof" and both of these were exceptions and not insured against. Gibson v. Georgia Life Insurance Co., (1915) 17 Ga. App. 43, 81 S. E. 335, distinguishing Hanover v. Georgia Life Insurance Co., (1914) 141 Ga. 389, 81 S. E. 206, where, under a similar policy, it was alleged that the car left the roadbed, and after crossing a ditch on the side of the road, collided with the bank on the further side of the ditch, and it was held that the petition was not subject to general demurrer, because, "when the plaintiff averred that he had left the roadbed, we do not think we can say, as a matter of law, that he alleged facts which shows that the accident fell within the exception."

In another case, where collision with any portion of the roadbed was excepted, it was held that, although the gutter of a street is within and a part of the street or roadway with respect to the power of a city to construct, improve and maintain streets, it is not a portion of the roadbed when considered with reference to the subject matter contemplated in such a policy, that the roadbed contemplated consisted of that portion between the gutters on either side, which was constructed for travel, and not to the gutters, designed for the purpose of draining water from the adjacent roadbed. At the same time, the court said that if the language was doubtful it was to be construed against the company.

In any event, the automobile seems to have left the road-

bed, as it skidded on the roadway, so as to thrust the rear wheels across a granitoid guttering, twenty inches wide, and on a level with, and adjacent to the roadway, and thence across a grass plot adjoining, two feet wide, where they collided with a sidewalk, six inches above the plot, causing damage to the automobile. Stix v. Travelers Indemnity Co., (1913) 175 Mo. App. 171, 157 S. W. 870.

§109. **Fall of Automobile Into Elevator Shaft Covered.**—A collision rider read as follows: "In consideration of $20, Additional Premium, this policy is hereby extended to cover damages to the automobile and equipment herein insured caused by collision with any other vehicle or with any animal or object, or any obstacle placed as a barrier; or in entering or leaving any building adjacent to any roadway. But nothing in this clause shall be held as making this company liable for damages caused by striking any portion of the gutter, roadbed or ditch, or by striking street or steam railroad rails or ties, or by upset unless the upset be caused by such a collision as is insured against hereunder; or for loss or damage by detention or loss of use."

An automobile insured under the foregoing rider was being taken by the chauffeur into a garage for the purpose of having some repairs made. The chauffeur took the car inside the building a distance of thirty to thirty-five feet from the entrance, when he stopped to speak to the foreman. The car was closed and it was somewhat dark. Intending to go to the second story, he backed the car into the open area of an elevator shaft and the car fell to the ground below. The insurance company's defense to an action on the policy was that the accident was not the result of a collision, and that it occurred inside of a building. It was held that there was a collision, as it could not be urged that when a body is hurled through the air and it hits the earth "striking" is not the accepted word to designate the contact, and "striking" was the defendant's own definition of the word "collision."

Regarding the meaning to be attributed to the phrase "on entering or leaving any building" it was held to be a fair interpretation of the rider and the policy that the insurer was liable for striking an object without regard to the place where it might occur and it was liable for any damage to the automobile on entering or leaving the building from accidents not caused by collision.

Should there be any doubt about the meaning of the language of the rider, the court would interpret it most strongly in favor of the insured and hold the insurer liable. Wetherill v. Williamsburgh City Fire Ins. Co., (1915) 60 Pennsylvania Superior Ct. 37.

§110. **Fall of Floor on Automobile Not Covered.**—A policy insured a car against damage by collision "with any other automobile, vehicle or object, excluding * * * damage caused by striking" roabed, rails or ties. While the car was in a garage, the second floor of the building fell upon it. It was held that the resulting damage was not caused by "collision." Such a construction of the policy would be a forced one and clearly not within the intention of either party to the policy. O'Leary v. St. Paul Fire and Marine Ins. Co., (1917) Tex. Civ. App. 196 S. W. 575.

§111. **Fall of Steam Shovel on Autotruck Covered.**—In an action by the seller and purchaser in a conditional sale contract of an autotruck against an insurance company on a policy in which, according to the parties' agreed statement of facts, there was "full coverage collision" insurance, it appeared that the truck was loaded by means of a steam shovel; that is, by a scoop connected with and swinging from the arm of a derrick. The scoop was filled with crushed stone, lifted by the derrick arm, swung over the truck, lowered to the proper position, and opened to allow the stone to fall into the truck body. At the time of the accident, the loaded scoop, while over and above the truck, fell from some unexplained reason upon the truck, causing damage to the truck in the agreed sum of $483.45.

As stated by the court the question involved was: Did the fact that the truck was struck by an object coming from above it, instead of on a level with it, remove the accident from the field of "collision," and relieve the defendant from liability? The Michigan Supreme Court answered the question in the negative, saying in part:

"Most collisions occur in the violent impact of two bodies on the same plane or level, and it is undoubtedly true that the word is more frequently used to express such impacts than other violent impacts. But we doubt that this fact has given to the word such a common understanding of its meaning as to exclude violent impacts unless upon the same plane or level. If one machine was going up and another going down a steep hill, and they came violently together, no one would hesitate for a moment in using the word 'collision', At what angle must the impact occur to make the use of the word 'collision' inappropriate and relieve the insurance company from liability? We are persuaded that the better rule, the safe rule, is to treat and consider the word as having the meaning given it uniformly by the lexicographers; that where there is a striking together, a violent contact or meeting of two bodies, there is a collision between them, and that the angle from which the impact occurs is unimportant. In the instant case there was the violent striking together of the truck and the heavily laden scoop; this was a collision within the meaning of the policy and rendered the defendant liable." Universal Service Co. v. American Insurance Co. of Newark, N. J. (1921)—Mich.—181 N. W. 1007. The court adverted to the contrary conclusion reached by the Wisconsin Supreme Court in Bell v. American Insurance Co., (1921)—Wis.—181 N. W. 733, (see supra §107).

§112. **Violation of Law by Insured.**—Action was brought on a policy which covered loss by collision when the automobile was being used for "pleasure and business calls." The car was destroyed while attempting to cross railroad tracks by being overturned on the tracks and then struck by

a freight train. At the time the insured was carrying through dry territory a considerable quantity of intoxicating liquor, which the insurance company claimed he intended to dispose of illegally in dry territory; but though the circumstances were suspicious, there was no direct proof of this. It was held that the use the plaintiff was making of his machine was within the terms of the policy, the company having chosen no more definite statement of the use in which liability should accrue for injury by a collision. Cohen v. Chicago Bonding & Insurance Co., (1920)—Minn.—178 N. W. 485.

CHAPTER XIV

Transportation Insurance

§113. **"Stranding or Sinking."**—A policy for one year covered loss from "stranding or sinking of any conveyance, by land or water, in or upon which such automobile is being transported," provided the car was not used "beyond the limits of the United States, Canada and Mexico, or between ports within said limits."

The automobile was damaged from being submerged in salt water as the result of the sinking of a ferry upon which the insured had driven it for transportation across Goose Creek, in Harris County, Tex. In an action on the policy one of the defenses was that the policy carried an implied warranty on the part of the insured of the seaworthiness of the ferry for the use he attempted to make of it, which obligation had been breached. The court held that this defense was not available, because not applicable to the kind of insurance here involved, and that the ordinary policy of automobile accident insurance, like the one here sued upon, is not of the character of a strictly marine insurance policy. The court said: "The nature of the risk is essentially different from that applying to hazards of the sea, if for no other reason, in that the subject of it, the automobile, was itself contemplated to be used as a means of conveyance, in reference to which no such condition as seaworthiness, or the lack of it, could have been thought of. Consequently the incidents of an undertaking to provide against 'the perils of the sea', or other hazards to which a seagoing vessel or a cargo carried in one, may become subject, do not attach. The

parties here by plain stipulations made another kind of contract." American Automobile Insurance Co. v. Fox (Tex. Civ. App. 1919) 218 S. W. 92.

It is the sinking of the ferry or other conveyance, not of the car itself, which is insured against.

A policy over an automobile contained the following endorsement: "In consideration of $28.05 premium * * * it is hereby understood and agreed that this policy is extended to cover the insured to an amount not exceeding $1,700 on the body, machinery and equipment while within the limits of the Dominion of Canada and the United States, including while in building, on road, on railroad car or other conveyance, ferry or inland steamer, or coastwise steamer between ports within said limits subject to the conditions before mentioned and as follows: (A) Fire, arising from any cause whatsoever, and lightning. (B) While being transported in any conveyance by land or water—stranding, sinking, collision burning or derailment of such conveyance, including general average and salvage charges for which the insured is equally liable. (C) Theft, robbery or pilferage, excepting * * *."

The car was being taken from the mainland to an island on a ferry operated by a chain. When the ferry reached the island, the driver was told it was all right to go ahead and he proceeded to drive the car off the ferry. After the front wheels had reached the land, the ferry began to move away, with the result that the car dropped into the water. The owner sued the insurance company for the cost of raising the car and of the repairs and new parts. It was held that the damage was not covered by the policy, the loss not having been caused by the stranding, sinking or collision or burning of the ferry boat.

The court said: "Clauses (A) (B) and (C) are intended, in my judgment, to define the three kinds of risk assumed by the insurers. (A) covering fire, that is, fire destroying or damaging the car itself, and lightning; (B) covering loss while being transported in any conveyance by land or water; and (C) covering 'theft,' 'robbery,' and 'pilferage.' It must

be observed that in clauses (A) and (C) the nature of the risk is definitely described by nouns, namely, 'fire,' 'lightning,' 'theft,' 'robbery,' and 'pilferage.' The corresponding words in clause (B) are 'stranding,' 'sinking,' 'collision,' 'burning', and 'derailment.' And the risk which the policy assumes is the stranding, sinking, collision, burning, or derailment of the conveyance containing the motor-car while being transported by land or water. It is not the stranding, sinking, etc., of the motor car itself which is covered, but of the conveyance; and any damage to the motor car resulting from any such accident to the conveyance would be covered by the policy. The opening words of the clause are to be interpreted solely as marking the occasion upon which any of the specified accidents to the conveyance will entitle the insured to recover." Wampler v. British Empire Underwriters Agency, (1920) 54 Dominion L. R. 657.

§114. **"Derailment."**—An action of contract was brought upon a transportation certificate of insurance, on the margin of which was printed: "This insurance is only against loss or damage by fire, collision or derailment on land, and marine perils while on ferries and transfers." In the body of the certificate the following appeared: "Shipped by auto truck at and from Medford, Mass., to destination East Princeton, Mass., covering only while in transit by land."

While the property was in course of transportation by auto truck the wheels of the truck skidded into the gutter, causing the truck to tip and capsize. The amount of damage for which the plaintiff would be entitled to recover, if the insurance company was liable at all under the certificate, was agreed upon by the parties.

As the accident was not caused by fire or by collision the sole question presented was whether the damage was caused by a "derailment" as meant by the certificate. "Derailment" is defined by Webster's International Dictionary as "the act of going off, or the state of being off, the rails of a railroad."

It was held that the word was to be interpreted according to the general and ordinary acceptation of the language used

in the absence of evidence that it has acquired by custom or otherwise a peculiar meaning distinct from the popular sense of the word. It is to be understood as conveying the usual meaning of the word as commonly accepted. It is plain that "derailment" is used only in connection with transportation by rail as distinguished from transportation by vehicles over land by means other than by rail, and as distinguished from transportation by water.

It was held that the language of the certificate was clear and free from ambiguity, and the parties must be bound by the agreement which they had entered into, in the absence of fraud or some other legal reason justifying a repudiation of the contract. The skidding of the hind wheels of the truck into the gutter, causing it to capsize when it was being operated on a public highway, was therefore found not to be "derailment," and the insurance company was not liable under the certificate. Graham v. Insurance Co. of North America (1915) 220 Mass. 230, 107 N. E. 915.

CHAPTER XV

Indemnity Insurance

§115. **In General.**—An automobile indemnity policy, as usually framed, has been described as a contract where, being properly notified of an accident or damage covered by the policy, the insurance company agrees to step into the insured's shoes as far as handling the claim or effecting settlement or defending suits is concerned. Burnham v. Williams and Quinn (1917) 198 Mo. App. 18, 194 S. W. 751.

An incorporated association whose business is that of indemnifying its members against loss resulting from damages inflicted by automobiles upon the person or property of others is an insurance company, and by virtue of the provisions of section 51 of the Kansas Civil Code an action on the contract of indemnity may be brought in the county in which the plaintiff resides. Emerson v. Western Automobile Indemnity Assn, (1919) 105 Kan. 242, 182 Pac. 647.

§116. **Right to Issue Indemnity Insurance.**—Indemnity or liability insurance differing widely from accident or property insurance, the question has arisen in various states as to the right, under the state statutes, to issue such insurance under the existing state statutes relating to automobile insurance. American Fidelity Co. v. Bleakley (1912) 157 Iowa 442, 138 N. W. 598.

So, in Michigan, it has been held that a statute which authorizes, under the heading "Fire Insurance Act," companies "to make insurance on automobiles whether stationary or being operated under their own power, against any hazard" does not authorize a company to write liability insurance, a contract of this kind being something more than "simply the placing of insurance on an automobile." American Automobile Insurance Co. v. Commissioner of Insurance (1913) 174 Mich. 295, 140 N. W. 557. The court said: "The language of the statute is not complex. Authority is given to 'make insurance on automobiles.' If it was an insurance on the automobile against fire, that would be a recognized hazard to which automobiles are subject. If it was an insurance on

the automobile against theft, that, too, would be a recognized hazard to which the automobile is subject. So of injury by accident, and the liability in each case would not be greater than the value of the automobile. Is not the relator doing more than placing insurance on automobiles?"

And it has been held in Iowa that a foreign insurance company, which has complied with all the provisions of the statutes of Iowa relative to its admission to that state, and has received a license from the state auditor to do business within the state, and which has power by the laws of its own state and by its charter to insure the owner or driver of an automobile, who is not an employer, against liability for damages to persons resulting from an accident caused by the owner's or driver's negligence in operating his machine could not issue such insurance in Iowa under the statutory provision authorizing insurance of the health of persons "and against personal injuries, disablement or death resulting from traveling or general accidents by land or water," or the provision authorizing employers' liability insurance. American Fidelity Co. v. Bleakley (1912) 157 Iowa 442, 138 N. W. 508.

The courts have no authority to override such legislation on the ground of comity between the states, since, within its power, the state, through its legislation, is supreme. American Fidelity Co. v. Bleakley (1912) 157 Iowa 442, 138 N. W 508. Since the policy of the state of Michigan, as evidenced by statutes and decisions, is to separate insurance on property from other lines, the Michigan Supreme Court holds that the rule of comity, permitting a corporation organized under the laws of another state, which authorize it to transact liability and other insurance on automobiles, to engage in similar business in other states, does not empower it to engage in such distinct lines of business not permitted by the Michigan statutes. American Automobile Insurance Co. v. Commissioner of Insurance (1913) 174 Mich. 295, 140 N. W. 557.

§117. **Criminal Prosecutions Not Insured Against.**—The word "suit" in an indemnity policy does not comprehend

criminal prosecutions. A provision in such a policy against loss from the liability imposed by law upon the insured on account of bodily injuries caused by the use of the automobiles specified in the policy that the insurer shall defend any suits brought against the insured on account of such injuries does not cover a prosecution for manslaughter arising out of the negligent operation of the car. Patterson v. Standard Accident Ins. Co. (1913) 178 Mich. 288, 144 N. W. 491, 51. L. R. A. (N. S.) 583, Ann. Cas. 1915 A 632. The court said: "It would be a forced and unnatural construction to hold that the word as used in this accident policy is intended to comprehend criminal prosecutions instituted and conducted by public officials in the name of the people, presumably for the punishment and suppression of crime * * *. Furthermore, the two essentials of a contract of insurance which are to be considered together in this inquiry are the subject matter and the risk insured against. The two automobiles constitute the subject-matter in relation to which the risk was assumed. Construing the various provisions of the policy together, we think it clearly evident that the controlling thought as to indemnity, the thing contracted for, was protection against risk of liability for injury resulting from accidents in the operation of the automobiles, not risk of public prosecution for crimes or misdemeanors committed in the use of them; and we conclude from the context that in this policy the word 'suits' must be taken to mean civil suits which would determine the pecuniary liability of defendant for injury to person or property; suits which, because of its promised indemnity, defendant was necesarily interested in defending."

§118. **Use of Car by Another Than Owner or His Servant.** —In a New York case it was held that where the plaintiff was insured against loss "by reason of the ownership, maintenance or use of" the automobile, he would require to show, in order to recover, that the chauffeur who drove the automobile at the time of the accident was his servant and engaged in his business, especially in view of the insured's

answer in the injured person's action denying that such chauffeur was the insured's servant and engaged in his business. All that appeared at the trial on this question was that the truck, which was used by the insured for delivery purposes, had been put into storage with a garage company, with liberty to rent it, and the garage company had sent it out, in charge of a chauffeur hired by it, to deliver for another company. This was held insufficient to bring the claim within the terms of the policy. Mayor, Lane & Co. v. Commercial Casualty Co. (1915) 169 App. Div. 772, 155 N. Y. Supp. 75.

§119. **Use of Car by Member of Owner's Family.**—A policy indemnifying the insured against claims for damages on account of bodily injury "accidentally suffered or alleged to have been suffered * * * by any person or persons by reason of the ownership, maintenance or use" of a described automobile, was held, in an Iowa case, not to limit the indemnity to claims for damages on account of injuries occurring while the insured is personally using the car, but to extend to an adult son, who was a member of the family, where it was known and understood by the company that the insured did not himself drive the car, and a clause in the policy exempting the insurer from liability for injuries when the car was being driven by anyone under sixteen years of age showed that the car was intended to be used as a family car. Fullerton v. United States Casualty Co., (1918) 184 Iowa 219, 167 N. W. 700.

§120. **Indemnity Policies Insuring Partnerships.**—An indemnity policy insured Hartigan & Dwyer, a copartnership, composed of Maurice H. Hartigan and Joseph E. Dwyer, against loss by accidents caused by a described delivery autohobile. While the automobile was being used in the business of another copartnership, Hartigan, Dwyer & O'Brien, consisting of the same individuals as the firm of Hartigan & Dwyer and one John J. O'Brien, and driven by an employee of Hartigan, Dwyer & O'Brien, a child was run over and killed. Hartigan & Dwyer paid two-thirds of the amount

for which the claim against Hartigan, Dwyer & O'Brien arising out of the accident was settled and maintained successfully an action on the policy to recover the amount thus paid by them. On appeal, the question was whether the policy could be so construed as to bring within its terms such individual liability. The plaintiffs directed the court's attention to the trial court's findings of fact, unanimously affirmed by the Appellate Division, that the policy insured the plaintiffs "and each of them" and that at the time of the accident the automobile was in use "by an agent of the plaintiffs and one John J. O'Brien." The New York Court of Appeals held that the terms of the policy were unambiguous and limited the liability of the insurer to accidents which happened while the automobile was being used on the firm business of Hartigan & Dwyer.

The plaintiffs succeeded in the lower courts on the theory that they were individually liable for the torts of the firm of Hartigan, Dwyer & O'Brien, but the Court of Appeals held that it was the firm of Hartigan & Dwyer, described in the policy as "department store merchant," that was insured, and that firm had committed no wrong and incurred no liability. Hartigan and Dwyer, as individual members of the firm of Hartigan, Dwyer & O'Brien, were not insured against liability for the acts of that firm. When a partnership is established, the liability of the individual partners is an incident of the partnership, merely, not a separate and independent liability. The policy protected Hartigan & Dwyer from loss by reason of automobile accidents for which their partnership was liable and to that extent protected them individually as members of such firm; but the one partnership as such was not a member of and was not liable for the torts of the other partnership. Hartigan v. Casualty Co. of America (1919) 227 N. Y. 175, 124 N. E. 789, reversing 165 N. Y. Supp. 894, which affirmed 161 N. Y. Supp. 145. The court distinguished this case from cases where the partnership was suing to recover for the loss one of its partners sustained and where a corporation was suing to recover the loss one of its stockholders sustained,

because, while a partner is individually liable for the debts of his firm, a partnership is not liable for the debts of the individuals who compose it, neither is a corporation liable for the debts of its shareholders. (See Kelly v. London Guarantee & Accident Co., 97 Mo. App. 623, 71 S. W. 711 and Rock Springs Distilling Co. v. Employers' Indemnity Co. of Philadelphia, 160 Ky. 317, 169 S. W. 730.)

§121. **Indemnity Policies Insuring Partners.**—Action was brought by Frank Steinfield against the Massachusetts Bonding & Insurance Company on an indemnity policy against loss imposed on the insured Steinfield by law "by reason of the ownership, maintenance or use" of his automobile. The plaintiff was a partner in the firm of B. Steinfield's Sons, and used the machine in the partnership business. One of the partners, while driving the machine, ran into one Dean, who recovered a judgment against the firm, which the firm satisfied.

It was held that the question whether the insurance company was liable for the Dean judgment did not depend on whether the plaintiff insured was using the machine on his own business when the accident happened, but on whether the law made him liable for Dean's loss. A partner being liable individually for the debts of his firm, the plaintiff was therefore legally liable for the judgment against the firm, so that the loss sustained by the plaintiff was covered by the policy. But as the firm of B. Steinfield's Sons paid the judgment and the expenses of defending the suit against it, the plaintiff insured could only recover in his suit against the insurance company the amount with which he would be charged because of the Dean suit on an accounting; and if he should succeed in his suit against the insurance company and the company should satisfy the judgment against it, the insurance company would be subrogated to his rights to proceed against the one who drove the machine. If the plaintiff, and not B. Steinfield's Sons, had paid the Dean judgment and the expenses incident to the suit, he could

recover the amount so paid from the insurance company, which could maintain an action under the subrogation clause of the policy for an accounting against the members of B. Steinfield's Sons, or against the one who was driving the machine, if, as between the partners, he was liable for the loss the firm sustained by the Dean suit. Steinfield v. Massachusetts Bonding & Ins. Co. (1920)—N. H.—111 Atl. 303.

§122. **Exception of Cars Used for Demonstration.**—In an action on an automobile indemnity policy the defense was based on the following clause in the policy: "Condition A. This policy does not cover loss * * * by reason of the use or maintenance of any of the automobiles enumerated under any of the following conditions * * * 5, while used for demonstrating or testing." It was admitted that the accident happened as described by the plaintiff's chauffeur, who testified that "after taking the owner for a drive, he returned to the hotel. I made a slight adjustment of the carburetor and took the car out to see what effect it had on the running of the motor, and in going around a turn the accident occurred."

It was held that it was a question for the jury whether, under the circumstances, the use of the automobile at the time the damage was done constituted such a demonstration or test as was contemplated by the condition mentioned. The terms used were considered not so self-explanatory, or so well understood by the general public, that it could be held as a matter of law that adjusting the carburetor and ascertaining the result of that adjustment by the owner's chauffeur, when he returned the car to the barn after an ordinary family drive, constituted "demonstration and testing" as used in the policy. The testimony submitted by the experts was contradictory, and each party claimed that the admitted facts did or did not constitute a demonstration or test. This conflict, it was held, but emphasized the judge's duty to fairly submit this fact to the jury. Kunkle v. Union Casualty Co., (1916) 62 Pa. Superior Ct. 114. In this case the court said:

"Automobile insurance is a new business, and deals with methods and complicated machinery of recent introduction; the several parts and the operation of the automobile have given to us many new words of indefinite meaning, and it is often necessary to rely on the mechanicians and trade experts to reasonably understand them, and, as in this case, the selected experts often differ in the meaning to be given to words that in other business affairs seem to have a clear and precise significance. This dispute was purely one of fact, and experts, who claimed technical and peculiar knowledge on the subject, were called by each party to give their opinions as to the business or trade meaning of the words—demonstration and testing. It is true that words, if of common use, are to be taken in their natural, plain, obvious and ordinary significations; but if technical words are used, they are to be taken in their special or technical sense, unless a contrary intention clearly appears in either case from the context."

§123. **Violation of Statute and Provision of Policy as to Age of Driver.**—Indemnity policies usually contain a stipulation that the company will not be liable if the automobile, at the time of an injury, is driven or manipulated by any one under the statutory age limit, or under a specified age in any event. Such provisions are valid and will be given effect to. The questions arising regarding the clause are mainly questions of fact, as to whether the automobile was, or was not, at the time of the injury, being "driven or manipulated" in violation of the clause or of the statute.

A liability policy contained a clause reading: "This policy does not cover in respect of any automobile while driven or manipulated by any person contrary to the statutory age limit of any state or under the age of sixteen years where there is no age limit." The Minnesota statute prohibits the issuing of a license to a person under 18, but does not prohibit anyone under 18 from driving an automobile as a hired chauffeur. An employee of the insured, over 16 but under 18, obtained a license, and, while operating the car, injured in

a collision an occupant of another automobile, who obtained a judgment against the insured. In an action on the policy it was held that the language of the exception is not clear. It may be construed to mean only that the insured will not be protected if his automobile is driven by a person who is either under 16 or under such age as the statute fixes as the minimum. Under that construction the company was liable. The construction for which the company contended was that there is no liability if the insured's automobile was driven by a person under the minimum age fixed by statute for licensed chauffeurs, viz., 18 years. It was held that under the language of the Minnesota statute the company was liable, a prior statutory provision prohibiting a person under 18 from driving as a chauffeur having been either intentionally or inadvertently dropped from the statute in 1915. Mannheimer Bros. v. Kansas Casualty & Surety Co., (1920)—Minn.—180 N. W. 229.

A provision of a policy that the insurance company should not be liable for accidents if the automobile, at the time of accident, was being driven by a person in violation of law as to age, was held sufficient to protect the company against liability where the automobile was being driven by a 16 year old son of the insured in violation of a city ordinance making it unlawful for any person under 18 years of age to drive an automobile within the city limits, if the ordinance was valid in fact, but not if it was invalid. Royal Indemnity Co. v. Schwartz, (1915)—Tex. Civ. App.—172 S. W. 581.

A policy which indemnified the insured against damages for personal injuries caused by his automobile expressly provided that the insurer should not be liable "in respect of injuries caused in whole or in part by an automobile while being driven or manipulated by any person in violation of law as to age." The New York Appellate Division holds that there can be no recovery under such a policy on a judgment recovered against the insured for personal injuries, where it appears that there was a violation of subdivision 2 of section 282 of the New York Highway law, the car at the time of

the injury having been driven by the insured's son, who was under 18 years of age and was not accompanied by a duly licensed operator or by the owner of the car, as required by the statute. Morrison v. Royal Indemnity Co. (1917) 180 App. Div. 709, 167 N. Y. Supp. 731.

A policy indemnifying the car owner against loss for bodily injuries accidentally inflicted upon others provided that the company should not be liable while the automobile was being driven by any person "under the age fixed by law" or under the age of 16 in any event. It was held that this clause had reference solely and exclusively to the minimum age (not less than sixteen) at which one might lawfully drive a motor vehicle; and the company could not escape liability for a loss sustained while the car was driven by an unlicensed person over 16, merely because of the non-observance of the statutory requirement that a licensed operator should accompany the unlicensed driver—a requirement which had no relevancy to the age of the driver. Brock v. Travelers Insurance Co. (1914) 88 Conn. 308, 91 Atl. 279.

An indemnity policy contained the following clause:

"This policy does not cover loss from liability for, or any suit based on, injuries or death caused by any automobile while driven or manipulated by any person under the age fixed by law or under the age of sixteen years in any event." In an action on the policy, the question was whether, under the circumstances, the automobile was, at the time of the accident, "driven or manipulated" by the insured or his son, who was less than sixteen years of age. It appeared that, while the automobile was being driven by the son, the father "suddenly leaned over to the left and took the wheel from his son, telling him to get out of the way," that "the son shrunk back in the seat ,and the father thereafter guided the course of the automobile and entirely controlled its operation so far as possible to do so in the position in which he was, and the son thereafter did nothing except to blow the horn," that under these conditions the automobile crossed parallel street railway tracks, passed in front of a

street railway car and then proceeded between the street car and the sidewalk, and ran into the plaintiff, who was standing on the street for the purpose of taking the car. It was held that a finding was warranted that at the time of the plaintiff's injury the automobile was "driven or manipulated," within the meaning of the policy, by the insured. Williams v. Nelson ,(1917) 228 Mass. 191, 117 N. E. 189.

The violation of the statute must, it appears, have some causative connection with the accident. While a policy agreeing to indemnify an insured against damages resulting to him because of his violation of a criminal statute is illegal and void, an indemnity policy agreeing to indemnify the insured against loss by reason of the operation of an automobile is founded on a good and valid consideration and is not, it is held, made void by an incidental violation of a statute prohibiting the operation of an automobile by an infant. So recovery was had under an indemnity policy, although the car was being operated in violation of the statute by a boy under 18 years of age, where no causative connection was alleged in the insurance company's answer between the operation of the car by the infant and the happening of the accident. Messersmith v. American Fidelity Co. (1919) 187 N. Y. App. Div. 35, 175 N. Y. Supp. 169, reversing 167 N. Y. Supp. 579.

The court said: "For all that appears here, the boy driving the car may have been a most skillful driver, and the injury may have been entirely without fault on his part. The violation of the statute may not have had anything whatever to do with the accident. If the violation of the statute can, under any circumstances, be a good defense to the policy in question, it cannot be under the answer as drawn, because it does not allege a causative connection between the violation of the statute and the accident."

§124. **Violation of Speed Ordinance.**—A policy indemnifying a taxicab company for accidents to persons caused by its taxicabs is broad enough to cover a loss sustained by the insured from an accident arising from violation of a speed

ordinance by one of its drivers, in the absence of a clause excepting such a risk. Taxicab Motor Co. v. Pacific Coast Casualty Co., (1913) 73 Wash. 631, 132 Pac. 393. A policy indemnifying the owner of taxicabs against consequences arising from wilful violations of a statute by the insured himself, would be void as against public policy, but such an owner may be lawfully insured against the consequences of such violations by his servants and employees, if such acts are not directed by or participated in by the insured.

§125. **Violation of Statute as to Registration.**—It would seem that under a policy of indemnity the insurance company could not escape liability upon the ground that the insured was operating his automobile in violation of law because he had not had it registered. Messersmith v. American Fidelity Co., (1919) 187 N. Y. App. Div. 35, 175 N. Y. Supp. 169, reversing 101 Misc. (N. Y.) 598, 167 N. Y. Supp. 579.

§126. **Actual Payment of Loss by Insured; Liability or Indemnity.**—A provision of the policy making the company liable only after payment by the insured of the loss, after actual trial of the issue, is valid. This clause distinguishes the policy as one insuring against loss and not against liability. A judgment for the amount alone, without payment, will not, ordinarily, make the company liable.

A by-law of an automobile insurance association read as follows: "No action shall lie against this association to recover for any loss sustained by a member unless it shall be brought by any such member for loss or expense actually paid in money by him, after actual trial of the issue, nor unless such action is brought within eighteen months after payment of such loss or expense." It was held, in an action against the association for the amount of a judgment recovered against a member, but which had not been paid, the member having become bankrupt, that payment in money by a policy holder of his loss and expense, after trial of the issue was a condition precedent to action on his policy, notwithstanding a provision of another by-law that the association

would, at its own cost, defend suits for damages against members; and the condition was not waived or forfeited by the company's defending the action in which the issue was tried, pursuant to the by-law casting the defense upon the insurer. Emerson v. Western Automobile Indemnity Assn., (1919) 105 Kan. 242, 182 Pac. 647. The court said: "After accident, an automobile owner is not grievously concerned about either legal liability or expenses, so long as an insurance company must pay the bills. To protect itself against indifference, improvidence, and even collusion and downright fraud, the insurer is obliged to undertake defense and make its own outlays for expenses. Under these circumstances, the insurer is not put to any election to forego these protective measures, or give up writing indemnity policies. Until the state interferes, an indemnity policy may lawfully be written which permits the insurer to guard against rendition of a judgment when there was no liability, and against rendition of a collusive or unjust judgment when there was liability. An automobile owner may take or leave such a policy; but when such a contract has been made, the insurer is not required to give up one feature in order to enjoy the benefit of the other."

But if the insurer, by wrongful conduct, unjustifiably prevent payment of loss in money after trial of the issue, it will be precluded from asserting, in an action on the policy, that the policy did not mature by reason of non-payment. And in such an action, certainty that payment would have been made if the insurer had not meddled, is not essential to estoppel. Reasonable assurance, under all the circumstances, that payment would have been made is sufficient. Emerson v. Western Automobile Indemnity Assn, (1919) 105 Kan. 242, 182 Pac. 647.

It is held that under a condition providing that no action shall lie against the insurance company to recover for any loss unless brought by the insured for loss actually sustained and paid by him in money in satisfaction of a judgment after trial of the issues, and that no action shall lie to recover under any other agreement of the company therein contained

unless brought by the assured himself to recover money actually expended by him, no right of action accrues to the insured where a judgment has been recovered against him for personal injuries sustained by a third person through the insured's alleged negligence unless he has actually paid the judgment. It follows that interest should not be charged prior to such payment. McClung v. Pennsylvania Taximeter Cab Co. (1916) 25 Pa. Dist. Ct. 583.

§127. **What Constitutes Payment of Judgment.** — The payment of a judgment by a promissory note for its amount satisfies a condition that no action shall lie against the company unless brought to reimburse the insured "for loss actually sustained and paid by him in satisfaction of a final judgment" where bad faith in giving the note is not shown, and the settlement was approved by the probate court. Taxicab Motor Co. v. Pacific Coast Casualty Co. of San Francisco (1913) 73 Wash. 631, 132 Pac. 393.

A condition of payment by the insured "within ninety days from the date of such judgment and after trial of the issues" is satisfied by payment within ninety days after the date of affirmance of the judgment by the Supreme Court. Taxicab Motor Co. v. Pacific Coast Casualty Co. (1913) 73 Wash. 631, 132 Pac. 393.

Where judgments were recovered against the insured and, being insolvent, it borrowed the money and paid the judgments, giving its note to the lender, and afterwards took up the note by assigning its cause of action against the insurance company, it was held that the burden was on the insurance company, seeking to escape liability on the ground of bad faith, to show some fact that would impeach the transactions, in the absence of a provision in the policy that the company shall not be lable if the insured becomes insolvent and borrows money to pay losses. Campbell v. London & Lancashire Indemnity Co. of America (1917) 168 N. Y. Supp. 300.

A provision in an indemnity policy that: "No action shall lie against the company to recover for any loss or expense

under this policy unless it shall be brought by the assured after actual trial of the issue," was held satisfied where the assured refrained from settling an action against him until after a complete record of the facts relating to his liability had been made by the presentation of all the evidence, especially where the insurance company had broken its contract by refusing to defend the action against the assured. Mayor, Lane & Co. v. Commercial Casualty Insurance Co. (1915) 169 App. Div. 772, 155 N. Y. Supp. 75.

A policy providing that if any person should sustain bodily injury by accident by reason of the use of the automobile for which injury the insured should be or be alleged to be liable for damages, the company would indemnify him against such liability and would pay all costs incurred with the company's written consent indemnifies against liability as distinguished from loss; and where the company refuses to defend an action against the insured, it is liable for a reasonable attorney's fee, for which the plaintiff has rendered himself liable in defending the action, though he has not paid the fee. Royal Indemnity Co. v. Schwartz (1915)—Tex. Civ. App.—172 S. W. 581.

§128. **Condition as to Payment Prohibited by Statute.**—Massachusetts St. 1914, c. 464, which in substance prohibits the insertion in a contract of casualty insurance, made after that statute took effect, of a condition that the insured must pay the amount of the loss before liability attaches to the insurer, is held constitutional by the courts of that state. Lorando v. Gethro, (1917) 228 Mass. 181, 117 N. E. 185.

§129. **Voluntary Payment by Insured Not Actual Payment.**—An insured company cannot, by its voluntary act in defending suit against its manager, add to the liability of the indemnity company, and thus make it indemnify the manager against the consequences of his negligence. So, where a policy provided that no action would lie against the insurance company under it unless brought to reimburse insured for a loss paid in money after trial in satisfaction of a judgment against the insured, the company was held not liable

where the insured, a company, defended and paid a judgment against its manager for injuries caused while the car was being used by the manager for his own purposes. Rock Springs Distilling Co. v. Employers' Indemnity Co. of Philadelphia (1914) 160 Ky. 317, 169 S. W. 730.

§130. **Right of Person Injured to Sue Insurance Company.** —Akin to the question as to whether a policy is a contract of liability or indemnity is that of the right of the person injured to sue the insurance company.

An indemnity policy contained the following provision: "No action shall lie against the company to recover for any loss or expenses under this policy unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after actual trial of the issues, nor unless such action is brought within two years after payment of such loss or expense." In July, 1911, a person was injured by an automobile operated by the automobile company protected by this policy and recovered a judgment for $1,500 in November, 1912. The automobile company went into the hands of a receiver some time in 1911. No part of the judgment was ever paid to the injured person, although he demanded payment from the receiver, and requested him to bring suit on the insurance policy, and offered to indemnify him for any cost incurred in that behalf. The injured person then sued the insurance company.

The Alabama Supreme Court held that under the express provisions of the policy, the assured, the auto company, had no right of action against the insurance company, except for liabilities actually discharged by the payment of money. Not having met this essential condition of the indemnity contract, the auto company could not itself maintain any action on the policy. Certainly a stranger to the contract could not do so directly or indirectly. Goodman v. Georgia Life Ins. Co. (1914) 189 Ala. 130, 66 So. 649, disapproving the doctrine of Patterson v. Adan (Philadelphia Casualty Co., etc. Garnishees, 1912) 119 Minn. 308, 138 N. W. 281, 48 L. R. A. (U. S.) 184 and citing a number of employers' indemnity cases in

support of its opinion. The court said: "Courts cannot tamper with and change the terms of contracts, nor can they substitute as beneficiaries thereunder unnamed and unintended strangers who have nothing whatever to do with either the contracts or the contractors. To exercise such powers would be to usurp despotic authority.

"If the insurance company received the funds of the auto company in payment of the policy premium under circumstances which made their diversion from the coffers of the auto company a material fraud upon complainant, he might recover the amount of the premium in a proper proceeding; but he cannot claim the fruits of the contract." It was held to be immaterial that the insurance company's attorney, at its instance, defended the suit against the auto company for a time, and then suffered a judgment by default.

The Alabama court, on a rehearing of the Goodman case, considered that a contrary construction of such an insurance contract, "is dominated by an undue regard for the injured stranger, rather than by a consideration alone of the intention and the obligations of the contracting parties. Such insurance contracts as these may be one-sided and unsatisfactory in their operation, but we know of no principle of law or public policy which forbids their operation exactly as stipulated by the parties, with which, as already stated, a stranger to the contract has absolutely no concern."

Where, under the clear provisions of the policy, it operates for the benefit of any injured person, and such injured person is authorized to sue the insurance company, such person may, under the Texas system of procedure, join in the same action the owner of the car and the insurer, even though the insurer is liable only after judgment has been awarded against the owner, and the cause of action against the owner sounds in tort and that against the insurer is based on contract; the two causes of action arising out of the same transaction. American Automobile Insurance Co. v. Struwe, (1920)—Tex. Civ. App.—218 S. W. 534.

Massachusetts St. 1914, c. 464, which gives to a person

injured by fault of the insured in a manner covered by the policy a beneficial interest in the proceeds thereof and permits him, after he has obtained a judgment against the insured, to maintain a suit in equity in his own name to procure the application of the insurance money to the satisfaction of his judgment, is held constitutional in Lorando v. Gethro (1917) 228 Mass. 181, 117 N. E. 185.

§131. **"Bodily Injury" As Affecting Third Person's Right to Recover.**—The Massachusetts statute, St. 1914, c. 464, permits a judgment creditor of one insured by a contract of casualty insurance against loss or damage on account of bodily injury or death by accident of any person arising from causes for which the insured is responsible, such judgment having been recovered for a cause covered by the contract of insurance, to proceed in equity against the insured and the insurer to reach and apply the insurance money to the satisfaction of the judgment.

The language of the statute renders it applicable to every contract of insurance whereby one "is insured against loss or damage on account of the bodily injury or death by accident of any person." The words "loss or damage" in this connection in the light of their context, and the manifest purpose of the statute, include a case where the insured has been held responsible to the extent of the rendition of a judgment against him, although no payment has been made on the judgment.

"Bodily injury", as used in the statute, imports, as it ordinarily does, harm from corporeal contact. In this connection "bodily" refers to an organism of flesh and blood. It is not satisfied by anything short of physical, and is confined to that kind of injury. It does not include damage to the financial resources of the husband arising from a bodily injury to his wife. Personal injury in other connections has been held to be of more comprehensive significance. But "bodily injury * * * of any person" cannot reasonably be held to include the kind of loss suffered by the husband. Therefore the husband is not entitled to recover the insur-

ance money in such a suit. Williams v. Nelson, (1917) 228 Mass. 191, 177 N. E. 189.

§132. **Judgment Against Insured; Garnishment.**—Where, under a policy insuring against loss by the operation of the insured's automobile, an action is brought by a person injured by the car against the insured, and the insurance company thereupon takes sole charge of the defense, to the exclusion of the insured, as it had the right to do under the policy, it has been held that a judgment in the action against the insured becomes, as between the plaintiff, the defendant, and the company, a liability or debt owing unconditionally by the company to the insured, which the plaintiff may reach by garnishment. Patterson v. Adan, (1912) 119 Minn. 308, 138 N. W. 281. The court admitted that this conclusion is not in accord with the weight of authority; but in the cases cited to sustain the opposite of the rule it was not clear that the company took exclusive, or any, charge of the litigation, and therefore, in the court's opinion, sufficient consideration was not given to this feature of the contract. (The doctrine of this case was disapproved in Goodman v. Georgia Life Ins. Co., 189 Ala. 130.)

§133. **Aid by Insured in Defense of Negligence Action.**—The insured in an indemnity policy is usually required by a clause in the policy to assist in the defense of actions against him.

An automobile indemnity policy contained the provision that: "The assured, when requested by the company, shall aid in effecting settlements, securing evidence, the attendance of witnesses and in prosecuting appeals." While riding with the assured in the car, the assured's sister was injured by falling from the front seat when the car skidded or by other accidental means struck a post at the edge of the pavement. She sued her sister, recovering a verdict and judgment for $730 and costs. The assured sued the insurance company. One of the company's defenses was that the assured failed to comply with the quoted provision requiring her to assist in

procuring evidence for use in defense of any action, or to rely in her defense upon a plea of contributory negligence of her sister. There was some evidence of eye-witnesses that the injured sister was sitting sidewise on the edge of the front seat with her back to the door, talking to the assured, who sat on the back seat. It was held that it was for the jury, which found for the insurance company, to say whether the refusal to plead contributory negligence was a violation of the quoted clause. Collins' Executors v. Standard Accident Insurance Co., (1916) 170 Ky. 27, 185 E. W. 112.

In this case the insurance company's chief defense was that the judgment recovered against the insured by her sister was procured by and through fraud and collusion between them. The evidence in the negligence case, the company contended, showed (1) that the insured, in notifying it of the accident, claim and action, falsely represented that there were no witnesses known to her other than her sister and herself, when she knew that the accident was witnessed by her own chauffeur and by another chauffeur, who lifted her sister from the street and placed her in the automobile after the accident; (2) that in giving such notice, she suppressed information of the fact that the injured person was her sister and had resided with her for several years, and falsely represented that her residence was elsewhere; (3) that she failed and refused to render assistance to the insurance company in securing evidence for use in the trial of her sister's action against her, and refused to make the defense advised her by the insurance company's counsel would be authorized by the law and facts; and (4) that she gave assistance to her sister in the latter's action against her, by carrying her in her automobile to her attorney's office during the latter's preparation of the case for trial, carrying her and some of her witnesses to and from the courthouse during the trial, and, on one occasion, during the trial, taking her sister and her witnesses to a restaurant for luncheon and returning them to the courthouse. This was held sufficient to authorize submis-

sion to the jury of the question of fraud and collusion between the assured and the injured person.

A valid defense to an action on an indemnity policy that the insured did not render the company such co-operation and assistance in the defense of the action against the insured as the policy required is held not shown by the fact that an officer of the insured at the inquest made certain statements concerning the instructions given the different drivers with reference to their duties which conflicted with his evidence at the trial of the action for damages, where it is not shown that he wilfully testified falsely or that his testimony affected the jury's verdict. Taxicab Motor Co. v. Pacific Coast Casualty Co. (1913) 73 Wash. 631, 132 Pac. 393.

If the company, taking charge of the defense of the action against the insured, has a defense that other causes than the wounds inflicted by the automobile caused the death sued for, it should make that defense in the action for damages, and cannot afterwards make it in an action on the policy. Taxicab Motor Co. v. Pacific Coast Casualty Co. (1913) 73 Wash. 631, 132 Pac. 393.

§134. **Settlements by Insured Without Insurer's Consent.** —A clause in an indemnity policy provided: "The assured may settle any case at the assured's own expense, giving immediate notice thereof in writing to the company, and the assured may settle any case at the company's expense, if the company shall have previously given its consent in writing." Under such a clause a settlement by the insured without the insurance company's consent will release the company from all liability to the insured. Kennelly v. London Guarantee & Accident Co., Ltd, (1918) 184 App. Div. 1, 171 N. Y. Supp. 423.

An insured sued on a policy for $5,000, against loss or expense on account of bodily injuries accidentally suffered by reason of the use of his automobile. It was alleged that the insured agreed to compromise an action for $10,000 against him for $3,150; that the insurance company, to escape payment of $750 of this sum, refused to compromise the claim

unless the insured would contribute that sum to the $3,150, and threatened that otherwise it would allow the case to go to trial and subject the insured to the hazard of having a verdict recovered against him in excess of the $5,000 limit of the policy, and forced the insured to pay the $750. It was held that, as there was no allegation that by the terms of the policy (which was not itself made part of the complaint), the insurance company agreed to consent to a settlement of any claim for less than the $5,000 limit, provided the sum the claimant was willing to accept was reasonable and fair and less than the amount which would probably be recovered in an action, the complainant failed to make out a cause of action. Levin v. New England Casualty Co., (1916), 97 Misc. 7, 160 N. Y. Supp. 1041; (1917), 101 Misc. 402, 166 N. Y. Supp. 1055, affirmed (1919) 187 App. Div. 935, 174 N. Y. Supp. 910.

Where the insurance company fails to perform its contract duty to defend, it waives the right to the benefit of provisions precluding the assured from settling and limiting its liability to losses sustained by the assured after the trial of the issues. But when, under such a policy, the insured settles an action before judgment, he assumes the risk in an action against the insurance company of showing, not only a liability covered by the policy, but the amount of the liability, and the recovery against the insurance company will be limited by the loss sustained, though the evidence may show that the settlement was for less than the liability. Mayor, Lane & Co. v. Commercial Casualty Co., (1915) 169 App. Div. 772, 155 N. Y. Supp. 75.

§135. **Effect of Insurer's Refusal to Accede to Compromise.**—The holder of a policy indemnifying the insured to the extent of $5,000 against loss by accident resulting in injuries or death to any person, pending suit by the administratrix of a person alleged to have died as the result of such an accident, which suit was defended by the insurance company, learned of the willingness of the plaintiff to accept $3,750 in full settlement of any damages that might be recovered in excess of $5,000, but the insured did not pay that sum to the

administratrix. It was held that the insurance company was not liable for damages caused to the insured by an excess judgment on account of the insurer's refusal to accede to the proposed compromise.

The policy in this case merely provided that the insured might not incur expense or settle a claim "except at his own cost." It was held that payment, pending suit, of the $3,750 which the administratrix offered to accept in settlement of any damages she might recover in excess of $5,000, was not forbidden, where such payment would not increase the company's liability or enhance its difficulties in defending the action.

On the latter point, two of the five judges dissented, on the ground that "the plaintiff expressly agreed that he would not, without the written consent of the insurance company, settle any claim or interfere in any legal proceeding;" that the proposed payment or settlement "would have been a violation of his agreement, and it was for the insurance company to say whether or not it would permit him to do as he wished." McAleenan v. Massachusetts Bonding & Ins. Co. (1916) 173 App. Div. 100, 159 N. Y. Supp. 401 affirmed 219 N. Y. 563, 114 N. E. 114.

§136. **Interference with Negotiations.**—What constitutes "interference" within the meaning of a clause forbidding the insured to "interfere in negotiations for compromise" it would in many cases be difficult to say. It has been held, however, that such a condition is not breached by the insured's action in mentioning to a party he had injured the fact of his insurance and telephoning him that the lawyer who would call on him, though he might call himself the insured's lawyer, was not his, but the insurance company's. Hopkins v. American Fidelity Co. (1916), 91 Wash. 680, 158 Pac. 535. The court said: "It is obviously impossible for the assured to avoid conversation with the injured, their families, or their representatives. Indeed, the insurer himself must desire them to say what they can to reduce irritation. If they are then compelled to admit that they are insured, the law will not

forbid their admitting the truth, and as to their voluntarily telling it, that is saying little more than claimants know. The vast majority of those who own automobiles are thus insured, and nearly every claimant knows or believes that they are. Neither can we assume that even if claimants do not know or suppose this, they will be harder to deal with when they find it out. That will depend on whether the owner appears of ample means himself."

§137. **Interference in Suits.**—Under a provision in a liability policy that the insured should not "interfere in any negotiations for settlement or legal proceeding without the consent of the company previously given in writing," it was held that a settlement by the insured of a suit brought by him against a third person, resulting from a collision with such third person's automobile, did not violate the policy, since the insurer, while having a right to control suits brought against the insured, could not control suits by the insured. And it was immaterial that it was stipulated in such settlement that it should not be used in evidence in actions against the insured, in the absence of a proven conspiracy on the part of the insured and others to aid the prosecution of suits against the insured and to impair the defense of them by the insurance company to its pecuniary loss. Utterback-Gleason Co. v. Standard Acc. Ins. Co. of Detroit, (1920) 179 N. Y. Supp. 836.

Where a liability policy contains a condition providing that the insured "shall not interfere in any negotiations for settlement or in any legal proceeding against the company on account of any claim," the insured has no claim against the company beyond the limit of liability prescribed by the policy, although the company took charge of the litigation against him upon which the claim was based and refused to make a settlement for much less than the judgment ultimately recovered. Such a condition places the litigation wholly within the control of the company without regard to the fact that its conduct may result in a judgment against the insured greatly in excess of the limit of liability in the policy. McClung v. Pennsylvania Taximeter Cab Co., (1916), 25 Pa.

Dist. 583, quoting and following Schmidt v. Travelers' Insurance Co., 244 Pa. 286, construing a similar clause.

§138. **Waiver by Insurer of Defense by Assuming Control of Suit.**—A defense by the insurer that the liability is not within the terms of the policy, is waived when it, with knowledge of the facts, and without reserving its rights, assumes absolute control of the action brought against the insured. American Indemnity Co. v. Fellbaum (1920),—Tex. Civ. App. —225 S. W., 873; Oakland Motor Co. v. American Fidelity Co. (1916) 190 Mich. 74. (See §142.)

Where the insured corporation warned the insurance company that the latter would be held to the terms of the policy, notwithstanding a release executed by the president of the insured corporation in settlement of his personal injury action against the driver of the automobile with which he, in the insured corporation's automobile, had collided, that the insured corporation would insist on the insurance company's defending suits by occupants of the other automobile, and that the insured corporation would not accept the insurance company's proposition to defend the actions without waiver of or prejudice to the insurance company's right to disclaim liability, the insurance company, by remaining in and continuing to defend such an action against the insured corporation, was held estopped, after judgment had been rendered against the insured, from disclaiming liability on the policy because of such release. Utterback-Gleason v. Standard Accident Insurance Co., (1920) 193 App. Div. 646, 184 N. Y. Supp. 862, affirming 179 N. Y. Supp. 836. Where an insurance company has, with full knowledge of the facts, undertaken to defend against the claim and suit of a person injured by an automobile which is the subject of a liability policy, in which the company has not only bound itself to assume the defense of "any claim" against which it undertakes to indemnify the insured, but has also excluded him from all right to act independently of the company in the matter of such suit, by a provision in the policy that the "assured shall not voluntarily assume any liability, either before or after the accident, nor shall he, without the written

consent of the company, incur any expense or settle any claim except at his own cost, nor interfere in any negotiation for settlement or in any legal proceeding conducted by the company on account of any claim, "the company cannot, while the case is still pending and undetermined, rightfully abandon it for no better reasons than its belated conviction that the policy did not impose upon it the duty to assume such defense because the accident was caused while the car was being driven by the owner's son and not by himself." Fullerton v. United States Casualty Co., (1919), 184 Iowa 219, 167 N. W. 700. The court said that the conduct of the insurance company in taking the business out of the hands of the insured after it was notified of the accident and two claims arising therefrom "was tantamount to an agreement or mutual concession that the policy was intended to cover these claims for damages, and, both parties having proceeded on that basis to a settlement with the Hockenburgs, and on to a point midway in the Jacobson suit, the insurer will not be permitted then to change front, abandon a defense it had undertaken, and escape liability, on the plea that it has mistaken the nature of its obligation."

The insurance company, however, does not waive its rights to disclaim liability under the policy by continuing the trial of the negligence action for a brief period after learning facts absolving it from liability; as where, after it has learned, on the last day of the trial, that the supposed licensed chauffeur accompanying the insured's minor son was not duly licensed. Morrison v. Royal Indemnity Co., (1917), 180 App. Div. 709, 167 N. Y. Supp. 732.

§139. **Effect of Insurer's Failure to Appeal.**—Where a liability company assumed the defense of an action against an insured owner, and a judgment was entered for a sum exceeding the amount of its liability, and the company, through its attorneys, promised and assured the owner that it would appeal and secure a reversal of the judgment, but failed to appeal, the owner not being advised of such failure until after the time to appeal had expired, the company, in

an action by the owner to recover damages suffered by reason of the company's failure to appeal, was held estopped to deny its liability, and that the defendant was damaged to the extent of the sum he was compelled to pay. McAleenan v. Massachusetts Bonding & Ins. Co., (1920) 190 N. Y. App. Div. 657, 180 N. Y. Supp. 287, affirmed 219 N. Y. 563.

If the judgment against the insured in a negligence action exceeds the insurer's liability, the Tennessee Supreme Court holds that the insurer must either provide the required supersedeas bond, and appeal, or pay the indemnity agreed upon. Seessel v. New Amsterdam Casualty Co. (1918) 140 Tenn. 253, 204 S. W. 428.

§140. **Insurer Cannot be Enjoined from Defending Suit Against Assured.**—An automobile insurance company cannot be restrained by an injunction from appearing by its own counsel and conducting the defense in an action against the assured owner of an automobile to recover damages for personal injuries. Gould v. Brock, (1908) 221 Pa. 38, 69 Atl. 1122.

§141. **Necessity for Notice to Insurer of Accident.**—Under a policy requiring immediate notice to the insurer of accidents insured against, it is said that the condition does not apply to every trivial occurrence even though it may prove afterwards to result in serious injury, and that, if no apparent harm come from the mishap, and there is no reasonable ground for believing at the time that bodily injury will follow, there is no duty upon the insured to notify the insurer. Haas Tobacco Co. v. American Fidelity Co. (1919) 226 N. Y. 343, (affirming 165 N. Y. Supp. 230), citing Melchior v. Ocean Accident & Guarantee Corp. (1919) 226 N. Y. 51. See also Fischer Auto & Service Co. v. General Accident, Fire & Life Assur. Corp. (1917) 8 Ohio App. 176.

But this principle is not to be extended. Where a boy was knocked down in the street, and at least slightly injured, it was held that the insured may not, without any investigation whatever, rely solely upon his own opinion, or upon that of his chauffeur, that because the boy went away the injury

was too trivial to require attention or investigation, and he is not excused from giving notice of the accident. Haas Tobacco Co. v. American Fidelity Co. (1919) 226 N. Y. 343, 123 N. E. 755, affirming 165 N. Y. Supp. 230.

Under a provision requiring that the assured, upon the occurrence of an accident, shall give immediate written notice thereof to the company, it may well be claimed that if the insured or his driver knows of even a slight injury to a third person in a collision, the stipulation of the policy would require notice of such injury, even though the insured might deem it unnecessary. Fischer Auto & Service Co. v. General Accident Fire & Life Assur. Corp. (1917) 8 Ohio App. 176.

It is proper to submit to the jury the questions of fact whether the circumstances of the accident were such as would have made it apparent to the insured that bodily injuries might result from the accident and whether the terms of the policy as to notice had been complied with. Fischer Auto & Service Co. v. General Accident, Fire & Life Assurance Corp. (1917) 8 Ohio App. 176.

Under a policy insuring against loss by liability for damages for bodily injuries, notice of injuries to property only is not required. Fischer Auto & Service Co. v. General Accident, Fire & Life Assur. Corp. (1917) 8 Ohio App. 176.

§142. **Time for Notice of Accident.**—The question of reasonableness of time within which notice is given the insurance company of an accident for which a claim is made under an indemnity policy, and of the sufficiency of excuses for delay, is to be determined according to the nature and circumstances of each individual case, the insured in all cases being required to act with due diligence and without laches on his part. Chapin v. Ocean Accident & Guarantee Corp. (1919) 96 Neb. 213, 147 N. W. 465, 52 L. R. A. (N. S.) 227; Fischer Auto & Service Co. v. General Accident, Fire & Life Assurance Corp., (1917) 8 Ohio App. 176; Schambelan v. Preferred Accident Insurance Co., (1916), 62 Pa. Superior Ct. 445.

In a syllabus by the court in Chapin v. Ocean Accident, etc., Co., it is said: "In a case where no bodily injury is apparent

at the time of the accidental occurrence, and there is no reasonable ground for believing that a claim for damages against the owner of the automobile may arise therefrom, he is not required to give the assurer notice until the subsequent facts as to injury would suggest to a person of ordinary and reasonable prudence that a liability to the injured person might arise. In such case the duty of the assured is performed if he gives notice within a reasonable time after the injury presents an aspect suggestive of a possible claim for damages."

An indemnity policy contained the following clause: "Upon the occurrence of an accident the insured shall give immediate written notice thereof, with the fullest information obtainable, to the agent by whom this policy has been countersigned, or to the company's home office. If a claim is made on account of such accident, the insured shall give like notice thereof with full particulars." In order to maintain an action on a policy containing such a clause, the insured is bound to give notice of both the accident and claim for damages as and when by the terms of the contract he agreed to do so. Conditions for notice of the event insured against such as these are common in policies for most kinds of insurance. They are nothing new or misleading. Such stipulations, when contained in the policy, are recognized as valid, and must be complied with before recovery can be had, if within the power of the insured. Failure by the insured to observe this condition precedent is failure to perform the contract on his part.

An automobile manufacturing corporation held an indemnity policy against accidents or injuries to third persons by its motor cars in testing them or before they were sold. This policy contained the foregoing clause as to notice, and obligated the insurance company to settle or defend litigation and hold the insured harmless when due notice of service and of suit was given. In an action on the policy the insurance company claimed that notice of an accident, for which suit was begun, had not been served until over three months after the

injury, and that in the meantime one of the testers involved in the injury had left the automobile company's employ and gone to unknown parts, and it had suffered from the neglect to give notice. The insured's chief inspector of mechanical parts, who had supervision over the testers, and its head tester, both learned of the accident and claim from the injured party's attorney within two or three days after the event, with data as to time, place and parties. They were persons holding positions of trust and responsibility. They made no report to any of their superiors. Their excuse was that the two testers involved denied the claim. Notice to them was held notice to the insured, notwithstanding their belief in the testers' denial, and the insurance company was discharged from liability on the policy. Oakland Motor Co. v. American Fidelity Co., (1916), 190 Mich. 74, 155 N. W. 729.

It appeared that the insurance company did take up the burden of defense of the claim under assurances and in the belief that the insured first learned of the matter when summons was served on it, and only learned the facts as to the previous knowledge of the insured's agents when they were brought out on the trial, whereupon counsel raised the objection and insisted that the insurance company had been both misled and handicapped by the long delay in notifying it, during which time it had no opportunity to see the parties and investigate before litigation was initiated, and the tester who, it was claimed, drove the offending automobile, had left the automobile company's employ and afterwards disappeared, for which reasons counsel proposed to turn the defense over to attorneys of the insured and retire from the case. It was held that its assuming the burden of the defense would not constitute a waiver so long as the insurance company had no knowledge of the insured's previous information and forfeiture of its rights under the policy; but whatever question that situation might otherwise have presented, the insurance company was fully protected by an agreement which provided: "That all acts of the parties hereto with reference to the conduct of the defense of said

case shall be considered as done without prejudice to their respective rights under said automobile policy." Oakland Motor Co. v. American Fidelity Co., (1916), 190 Mich. 74, 155 N. W. 729.

What is a reasonable time for giving notice must be determined by the court as a question of law when the facts are not in dispute. Oakland Motor Co. v. American Fidelity Co., (1916) 190 Mich. 74, 155 N. W. 729, holding that three months was an unreasonable time to delay notifying the insurance company. But if the lapse of time between the occurrence of an accident and the notice thereof is not of such duration as would justify the court in disposing of the issue as a matter of law it should be submitted to a jury for proper determination. Schambelan v. Preferred Accident & Insurance Co., (1916), 62 Pa. Superior Ct. 445.

Under policy provisions that "the assured upon the occurrence of an accident shall give immediate written notice thereof with the fullest information obtainable" to the company, and that "if claim is made on account of such accident the assured shall give like notice thereof," the insured is not barred from recovery on the policy by the fact that he did not give immediate notice of the accident, where he had no knowledge of a person injured therein, and he gave immediate notice as soon as he heard that a person had been injured and that a claim was made. Schambelan v. Preferred Accident Insurance Co., (1916), 62 Pa. Superior Ct. 445. The purpose of a provision in an insurance policy insuring against loss or damage caused by vehicles of the insured, which requires the insured to give written notice to the insurer "immediately upon the occurrence of an accident * * * with the fullest information obtainable at the time," is to enable the insurer to ascertain all the facts and circumstances surrounding the accident while such facts are fresh in the memory of witnesses, so that the insurer may be prepared either to defend or to make settlement if any claim is thereafter made or suit brought for damages resulting from personal injuries. Forbes Cartage Co. v. Frankfort Marine, Acci-

dent & Plate Glass Insurance Co. (1915) 195 Ill. App. 75.

Under an insurance policy insuring against loss or damage caused by vehicles of the insured, where an accident occurs and the insured as a result of its own investigations is satisfied that no claims for personal injuries can be successfully made, and such insured does not immediately notify the insurer of the accident as required by the policy, the insured thereby elects to carry the risk itself and absolves the insurer from liability. Forbes Cartage Co. v. Frankfort Marine, Accident & Plate Glass Insurance Co., (1915) 195 Ill. App. 75.

§143. **Waiver of Condition as to Notice of Accident.**—A failure to give notice within the time required of an accident in respect of which suit is subsequently brought on the policy will be a breach of the condition requiring such notice, unless the insurance company waives the breach or estops itself from denying the performance of the condition. Lee v. Casualty Co. of America, (1916), 90 Conn. 202, 96 Atl. 952. The court said: "The purpose of the notice of an accident is the same in casualty insurance as the notice of a loss by fire in fire insurance and of the death of an insured in life insurance. Being for the benefit of the insurer, it may be waived by it in the one case as well as the others. It is well settled that the notice of loss by fire and death may be waived. The same principle is involved in the one case as in the others. There may be more reason why an insurer would insist upon the notice, and less likelihood that it would waive it, in the case of a casualty than in the other cases. It is a stipulation upon which it may insist, but one which it may waive."

Waiver may be implied as well as expressed. It appeared, in an action on an indemnity policy, which contained no provision that the policy should be forfeited by a breach of the condition as to immediate notice, that notice of the casualty was given by the plaintiff and received by the company's agent, but not immediately after the casualty, as required by the policy. The company, knowing this, and without claiming a breach of the conditons of the policy, proceeded at

once, and continued for nearly two months, to attempt to make a settlement of the claim of the injured party. It then called upon the plaintiff for further information and proof as to the casualty, and two months later called upon him for the papers in the action which had been commenced by the injured person against the plaintiff, and shortly before the trial of that case returned the papers to him with the information that it took no interest in the case, that it had cancelled the policy as of the date of issue, and there was no insurance in force at the time of the casualty. It was held that from these facts a very strong inference would arise that the company had intended to waive the plaintiff's breach of the condition respecting immediate notice; and that if such was the fact, the company could not afterwards revoke the waiver and insist upon a breach of the condition in order to relieve it from liability. Lee v. Casualty Co. of America, (1916), 90 Conn. 202, 96 Atl. 952.

§144. **Amount of Recovery.**—Under a clause in a liability policy limiting liability in case of the bodily injury or death of one person to $5,000, a policy holder cannot recover more than that sum, although a judgment may have been recovered against him in a much larger sum on a claim within the policy, and the policy contains a further limit of $10,000 where more than one person has been injured, subject to the same limit for each person. McClung v. Pennsylvania Taximeter Cab Co., (1916), 25 Pa. Dist. 583.

An indemnity policy insuring against "damages on account of bodily injuries" limited the company's liability "on account of an accident resulting in such injuries to one person" to $5,000, and "subject to the same limit for each person, the corporation's total liability on account of any one accident resulting in injuries to more than one person" to $10,000. Damages were recovered against the insured by two persons, husband and wife, for injuries to the wife, and paid. The insurance company, in an action on the policy, conceded that it was bound to indemnify the insured for both these recoveries, subject to the limitation expressed in the policy.

The only question was whether the limit of liability was $5,000 or $10,000. It was held the limit was $5,000 under the condition quoted, this clause, by the use of the word *"such"* injuries referring only to *bodily* injuries, and limiting the indemnity, "no matter how many may recover because of such injury, since, as in this case, more than one person may claim and secure damages for bodily injuries to the one person." The latter part of the condition, which increases the limit where more than one person is injured as a result of any one accident, is distinctly stated to be "subject to the same limit for each person," that is, to the $5,000 limit for each person receiving bodily injuries. Klein v. Employers' Liability Assurance Company, (1918), 9 Ohio App. 241

§145. **Same; Bond Premium Not Covered.**—An automobile company doing business in the State of New York issued a liability policy to a foreign corporation. Its automobile ran over a man, killing him. His administrator brought suit and attached the insured company's property in New York State. The insured bonded the attachment, and sued the insurance company to recover, and had judgment for the amount of the premium paid by it for the bond and the amount paid by it to the sheriff for poundage. The policy provided that the insurance company should defend suits, "pay all costs and expenses incident to the investigation, adjustment and settlement of claims, and all costs taxed against the assured in any legal proceedings defended by the company." It was held, on appeal, that the insured could not recover the bond premium and poundage, for, while it would not have been put to this expense had there been no accident, and thus no suit, the expense was occasioned wholly by the fact that it was a non-resident; and the bonding of the attachment merely caused the substitution of one form of security for another, the attachment not affecting the merits of the controversy in the suit. Green River Distilling Co. v. Massachusetts Bonding & Insurance Co. (1920)—N. Y. App. Div.—185 N. Y. Supp. 307.

§146. **Same; Insured's Costs After Insurer's Failure to Defend Suit.**—A clause in an indemnity policy obligated the insurance company to "pay all costs incurred with the company's written consent." In an action by the insured against the company for attorney's fees and costs incurred by him in the defense of a suit for damages for the death of a child caused by the operation of the automobile, which was subsequently settled, the court said: "The company having refused to defend, as it had obligated itself to do, it was incumbent upon Schwartz (the insured) to conduct his own defense. Since the question of Schwartz's liabiilty for the death of the child is not now in question, because he is not now suing for the amount paid as damages, but for attorney's fees for which he is liable, he is clearly entitled to recover, and it was not necessary that the fee be paid to enable him to recover, but when he established that he was obligated to pay, and that his fee is reasonable, the liability contemplated by the policy had arisen, and his cause of action accrued." And in such circumstances the insurance company's consent in writing to incur the fee was not essential. Royal Indemnity Co. v. Schwartz (1914)—Tex. Civ. App.—172 S. W. 581.

Where the policy provides that the insurer is to defend any damage suit against the insured, covered by the policy, whether groundless or not, the insurer, on failure to defend a suit, notwithstanding it was groundless and defeated, will be liable to the insured for the costs and expenses of the defense. Green-Robbins Co. v. Pacific Surety Co., (1918), 37 Cal. App. 540, 174 Pac. 110.

§147. **Provision Against Waiver of Conditions by Company's Officers.**—Where a condition in a liability policy expressly provides that no provision of the policy shall be "waived or altered, except by endorsement hereon signed by the president or the secretary," a parol promise by the vice-president and general manager of the company to a policy holder to save him harmless from liability under a possible judgment, although the amount might exceed the limit of liability in the policy, is void as in conflict with an essential

condition of the policy. McClung v. Pennsylvania Taximeter Cab Co. (1916) 25 Pa. Dist. 583.

§148. **Effect of Settlement by Insurer on Rights of Insured.**—An automobile indemnity contract has been said to be one where, being properly notified of an accident or damage covered by the policy, the insurance company agrees to step into the assured's shoes so far as handling the claim or effecting settlement or defending suits is concerned; and the attitude that it requires an assured to take when a claim is made against him is rather one of an agent to the company than a principal for whom the company is acting. Besides, the contract is to handle only such business as is brought against the assured, and none of the provisions of the policy can be construed as giving the insurance company power to settle any claims which the assured may have against some third party.

Therefore, where an insured had a collision with another automobile, clearly caused by negligence of the driver of the latter, but the driver of the other car threatened to sue the insured and the insurance company's adjuster settled with the driver of the other car for $200, this settlement which the insured had no hand in, he being forbidden by his policy to interfere with negotiations for the settlement of claims, did not bind him and estop him from asserting a claim for damages to his automobile against the driver of the other car. Burnham v. Williams and Quinn (1917) 198 Mo. App. 18, 194 S. W. 751.

§149. **Effect of References to Insurance in Negligence Actions.**—The general rule that it is improper, in a negligence action, to bring to the knowledge of the jury information that the defendant is insured against the injury for which the action is brought is well settled. The rule applies alike to testimony introduced and to remarks of counsel. Akin v. Lee (1912) 206 N. Y. 20, 99 N. E. 85, reversing 145 App. Div. 950; Griessel v. Adeler (1918) 183 App. Div. 816, 171 N.Y. Supp. 183; Tincknell v. Ketchman (1912) 78 Misc. (N. Y.) 419, 139 N. Y.

Supp. 620; Allen v. Arnink Auto Renting Co. v. United Traction Co. (1915) 91 Misc. (N. Y.) 531, 154 N. Y. Supp. 934; Horan v. Altman (1919) 176 N. Y. Supp. 433; Livingston v. Dole (1918) 184 Iowa 1340, 167 N. W. 639; Scranton Gas & Water Co. v. Weston (1916) 63 Pa. Superior Ct. 570; Conover v. Bloom (1921)—Pa.—112 Atl. 752; Blaback v. Blacksher (1914) 11 Ala. App. 545, 66 So. 863; Carter v. Walker (1914) —Tex. Civ. App.—165 S. W. 483.

It is also reversible error to permit counsel to ask jurors in such actions if they are connected with an insurance company. Martin v. Lilly (1919) 188 Ind. 139, 121 N. E. 443; Schmidt v. Schalm (1913) 2 Ohio App. 268.

The New York Court of Appeals has held it to be reversible error, in an action to recover for injuries to a plaintiff who was run into by an automobile, to admit testimony that the defendant stated, in a conversation after the accident, that he was insured against such accidents. The court said: "Such evidence, almost always, is quite unnecessary to the plaintiff's case and its effect cannot but be highly dangerous to the defendant's; for it conveys the insidious suggestion to the jurors that the amount of their verdict for the plaintiff is immaterial to the defendant. It was a highly improper attempt on the plaintiff's part to inject a foreign element of fact into his case, which might affect the jurors' minds, if in doubt upon the merits, by the consideration that the judgment would be paid by an insurance company. While, frequently, in the exercise of the authority conferred upon this court, we disregard technical errors, when we see that they do not affect the merits of the controversy, the error committed in this case is of too grave a nature to be put aside as merely technical. In repeated instances, judgments have been reversed for its commission and counsel must take notice that we shall adhere to our rule and that we shall order a new trial in all cases where, in such actions, a verdict may have been influenced by the consideration of such unauthorized evidence." Akin v. Lee (1912) 206 N. Y. 20, 99 N. E. 85, reversing 145 App. Div. 950.

In an action for injuries from a collision with the de-

fendant's automobile the defendant was asked on cross examination, and was allowed, over objection, to answer, whether he had not told counsel he would have to refer to his insurance company. Subsequently the defendant's answer was stricken out, and the objection to the question sustained. A verdict for the plaintiff was set aside on the ground that the fact that the defendant was insured against any judgment which might be obtained against him was brought to the attention of the jury. It was unsuccessfully urged by the plaintiff that evidence otherwise competent cannot be excluded because it incidentally infringes upon the general rule above stated, and that in this case the question was asked, not for the purpose of showing insurance protection, but to establish that, when the defendant was charged with causing the plaintiff's injuries, he failed to deny that charge, thereby tacitly admitting his connection with the accident. It was on this theory that the trial court at first permitted the question to be answered, but upon reflection it reversed the ruling and sustained the objection. There still remained, however, the fact that the question had been put in the jury's presence. On this point the court said: "The question of fact as to whether or not defendant caused the accident under consideration was exceedingly close and it is impossible to say that the statement that defendant understood he had an insurance behind him embodied in the question did not influence the jury in rendering the verdict which it did. While it is true that the answer was stricken out and the objection to the question sustained, the prohibited matter was by the question brought squarely before the jury and might have had considerable weight in their determination." Tincknell v. Ketchman (1912) 78 Misc. (N. Y.) 419, 139 N. Y. Supp. 620.

The offending party cannot escape the effect of the testimony given by him as to the defendant's statement to him that he had insurance on the car on the ground of his ignorance of the baneful effect it would probably have upon the jury. "He must be given credit for common sense and at

least a modicum of knowledge of human nature." Carter v. Walker (1914)—Tex. Civ. App.—165 S. W. 483.

In an action by the owner of an automobile for damages done by a third person to the car, the fact that he carries insurance on the automobile against accident and that he has been paid in part, or even in full, by the insurance company for the damages for which he is suing, is not admissible for the purpose of reducing the damages recoverable for the defendant's negligence. Hill v. Condon (1915) 14 Ala. App. 332, 70 So. 208. But see Magee v. Vaughan (1914) 212 Fed. 278, 134 C. C. A. 388, holding that evidence of statements by the defendant as to being insured was admissible to show ownership, where that was in doubt, or such control over the automobile as would place a liability on the defendant from which he had protected himself by insurance, and that the fact that it might be inadmissible on other grounds and tend to prejudice the minds of the jury in arriving at a verdict was not sufficient reason for excluding it.

§150. **Same; Error Cannot be Cured by Instructions to Jury.**—The effect of such testimony or remarks of counsel is not cured by an instruction to the jury to disregard it. Tincknell v. Ketchman (1912) 78 Misc. (N. Y.) 419 139 N. Y. Supp. 620; Martin v. Lilly (1919) 188 Ind. 139, 121 N. E. 443; Aqua Contracting Co. v. United Rys. Co. of St. Louis (1918) Mo. App. 203 S. W. 481; Schmidt v. Schalm (1919) 2 Ohio App. 268.

No amount of admonition to the jury can remove the effect of such testimony, because it cannot remove the knowledge that the suit was not one between citizens, but between a citizen and a corporation. Carter v. Walker (1914)—Tex. Civ. App.—165 S. W. 483.

In an action for injuries to the plaintiff's automobile, due to the defendant's negligence, the trial court was held within its judicial discretion in granting the plaintiff's motion for a new trial for misconduct of the defendant's counsel in inquiring of a witness for the plaintiff whether the latter carried collision insurance, although the court had sustained

an objection to the question, had instructed the jury to disregard it, and had reprimanded counsel. The trial judge had before him not only the witnesses but the jury, and was judged better able than the appellate court to determine whether the effect of the poison so injected into the case by the defendant's counsel was still present with the jury. Aqua Contracting Co. v. United Rys. Co. of St. Louis (1918)—Mo. App.—203 S. W. 481.

In an action for damages against the owner of an automobile intimations by counsel that some insurance company is interested in preventing a recovery, as by remarks in the presence of prospective jurors being examined on voir dire that doctors would probably be called upon to testify as to the physical condition of the defendant, both by the plaintiff and the insurance company, no insurance company being a party to the action, are prejudicial to the rights of the defendant and highly improper. They are not cured by the trial court's sustaining an objection to the remark, and instructing the jury to entirely disregard any remark made about an insurance company being connected with the case. The court said: "The true defendant was thereby made to bear the burden of whatever prejudice existed in the minds of the jurors against insurance companies. This was manifestly unfair to him, as under a policy of casualty insurance the liability of the insurer is usually limited to a fixed amount. A recovery in excess of this amount in an accident case must be borne by the insured. Thus the defendant might have been greatly prejudiced by such a remark. Moreover, an insurance company, if there be one that is in anywise interested in the outcome of the case that is not a party to the action and does not have the right to plead or defend in the action, nor the right to show the nature and extent of its obligations to the defendant, should not be prejudiced in its rights by such remarks. Ths rights of the parties to an action should be determined by the pleadings and the evidence in the case and not by some extraneous consideration. Such a remark as that referred to, if made purposely, could have no other object

than to prejudice the jury against the defendant, and is obviously improper." Schmidt v. Schalm (1913) 2 Ohio App. 268.

It has, however, been held that slight references made during the trial to a casualty company, which were stricken by the court from the record, and the jury admonished to pay no attention to them and no harm appearing to have resulted therefrom, did not constitute material error. Stafford v. Noble (1919) 105 Kan. 219, 182 Pac. 650.

And where the trial court nullified the effect, if prejudice entered into the jury's verdict because of the improper reference to insurance, by reducing the verdict from $7,500 to $5,000, the error was not considered on appeal. McNamara v. Leipzig (1917) 180 App. Div. 515.

Where the defendant does not take any steps whatever in the matter of trying to nullify or render harmless an improper remark of an attorney by calling upon the court, by motion or otherwise, to make any ruling in the premises, and no ruling is made, error will not, on appeal, be predicated upon the improper remark. Norris v. West (Ind. App 1921) 129 N. E. 862; Stafford v. Noble (1919) 105 Kan. 219.

§151. **Same; Defendant Cannot Complain if Reference First Made by Him.**—If the defendant himself injects into the case a reference to insurance, for which the plaintiff is in no way responsible, the defendant cannot thereafter take advantage of his own error and complain of a subsequent question as to insurance by the plaintiff's counsel. Ward v. Teller Co. (1915) 60 Colo. 47, 153 Pac. 219; Gianini v. Cerini (1918) 100 Wash. 687, 171 Pac. 1007; Kellner v. Christiansen (1919) 169 Wis. 390, 172 N. W. 796

So, a defendant cannot complain of questions as to whether she was insured when she has opened up the matter herself by pleading and relying upon a release purporting to have been executed to her, but which was, in fact, negotiated by the indemnity company. Beatty v. Palmer (1916)—Ala.—71 So. 422.

Chapter XVI

Public Service Vehicle Bonds

§152. **Requirement by Statute or Ordinance of Bonds by Operators of Public Service Vehicles Valid.**—The requirement of the execution of bonds by operators of public service buses is a valid exercise of the police power and within the authority of the state and its governmental agencies, municipal corporations. Willis v. City of Fort Smith, (1916), 121 Ark. 606, 182 S. W. 275, ($2,500); Hazleton v. City of Atlanta (1916), 144 Ga. 775, 87 S. E. 1043, 93 S. E. 202, ($5,000 held not unreasonable); Huston v. City of Des Moines, (1916), 176 Iowa 455, 156 N. W. 883, ($2,000 held clearly reasonable); Ex parte Counts, (1915), 39 Nev. 61, 153 Pac. 93 ($10,000 for first jitney, and $5,000 for each additional bus); City of Memphis v. State ex rel. Ryals, (1915), 133 Tenn. 83, 179 S. W. 651 ($5,000); Ex parte Boyle, (1915), 78 Tex. Cr. 1, 179 S. W. 1193, ($5,000; $2,500 for each injury to person or property); State v. Seattle Taxicab & Transfer Co., (1916), 90 Wash. 416, 156 Pac. 837 ($2,500); Salo v. Pacific Coast Casualty Co., (1917), 95 Wash. 109, 163 Pac. 384; Singer v. Martin, (1917), 96 Wash. 231, 164 Pac. 1105; Nelson v. Pacific Coast Casualty Co., (1917), 96 Wash. 43, 164 Pac. 594; Commonwealth v. Slocum, (1918), 230 Mass. 180, 119 N. E. 687 ($1,000 not unduly burdensome or unreasonable); Commonwealth v. Theberge, (1918), 231 Mass. 386, 121 N. E. 30 ($2,500 not un-

reasonable); In re Cardinal, (1915), 170 Cal. 348, 150 Pac. 348, ($10,000 aggregate; $5,000 for any one person killed or injured, $1,000 for injury or destruction of any property); Greene v. City of San Antonio, (Tex. Civ. App., 1915), 178 S. W. 6; Auto Transit Co. v. City of Ft. Worth, (Tex. Civ. App., 1916), 182 S. W. 685; City of Providence v. Paine, (1918), 41 R. I. 333, 103 Atl. 786 ($500 for each passenger authorized to be carried in the bus); West v. Asbury Park, (1916),—N. J. L.—99 Atl. 190; Ex parte Dickey, (1915), 76 W. Va. 576, 85 S. E. 781; Ex parte Sullivan (1915) 77 Tex. Cr. 72, 178 S. W. 537; City of Dallas v. Gill (1918)—Tex. Civ. App.—199 S. W. 1144; Ex parte Parr (1918) 82 Tex. Crim. App. 525, 200 S W. 404; Darrah v. Lion Bonding & Surety Co., (1918)—Tex. Civ. App.—, 200 S. W. 1101; Nolen v. Riechman, (1915), 225 Fed. 812 ($5,000 for each jitney operated). "There can be no doubt that the safe operation of an automobile depends largely on the caution, skill and responsibility of its driver. Any measure that will tend to secure careful, competent men as drivers of jitneys will promote the safety of passengers and the general public. It is at once apparent that the requirement of a bond would have this effect. No one would be willing to become surety for a reckless or incompetent driver, and the fact that he was under bond, with his responsibility fixed, would, of itself, make the driver more careful. It would appear, therefore, that the city could properly require the giving of a bond in the reasonable exercise of its police power." Lutz v. City of New Orleans, (1916) 235 Fed. 979.

§153. **Immaterial that Bonds May be Beyond Reach of Some Owners.**—The fact that such bonds are denied to, or are not within the power of, those who are financially irresponsible does not show that the act requiring them is unreasonable or unconstitutional as prohibitive. State v. Seattle Taxicab & Transfer Co., (1916) 90 Wash. 416, 156 Pac. 837; Hadfield v. Lundin (1917) 98 Wash. 657.

§154. **Requirement of Surety or Insurance Company Bond**

or Policy Valid.—Some ordinances provide for a surety company bond or a policy of insurance executed by a company authorized to do business in the state. Ex parte Counts (1915) 39 Nev. 61, 153 Pac. 93. Such a requirement does not render the provision invalid. *In re* Cardinal, (1915) 170 Cal. 519, 150 Pac. 348. The court said: "We know of no constitutional right that one has to give any particular kind of security. A legislative body having the right to require the giving of security necessarily has the right to prescribe the kind that shall be given, with the limitation always, of course, that its provisions in this regard shall not be unreasonable, or based upon any other consideration than its conclusion as to what is necessary for the protection of those concerned." To the same effect is City of New Orleans v. Le Blanc (1916) 139 La. 112, 71 So. 248. No one has ever successfully questioned in the Washington courts the power of the legislature to make provisions restricting the character of the surety to surety companies licensed to do business in the state. State v. Seattle Taxicab & Transfer Co. (1916) 90 Wash. 416, 156 Pac. 837.

The requirement in a municipal ordinance that a jitney bond be signed by a surety company does not violate the liberty of contract of the owner of the machine. Lutz v. City of New Orleans, (1916), 235 Fed. 979.

The objection that no surety company will execute the bond required unless the principal deposits with it $5,000 in cash, or collateral security, is not sufficient to make the ordinance invalid. Personal surety might make the same requirement. Considering the greater desirability of corporate surety in any case, a superiority sometimes recognized by the law itself, it can hardly be said that the provision that the bond must be signed by a surety company is more onerous than would be a requirement of personal surety of equal responsibility. Lutz v. City of New Orleans (1916) 235 Fed. 979.

In the Pennsylvania courts, however, a requirement of an ordinance that the bond must be furnished by a surety

company, and forbidding the deposit of cash, or a certified check or municipal bonds, or the acceptance of individual freeholders of unquestioned financial responsibility, has been held unreasonable and void. Jitney Bus Assn. of Wilkesbarre v. City of Wilkesbarre (1917) 256 Pa. 462, 100 Atl. 954.

§155. **Routing.**—Under the Washington act (Rem. Code, § § 5562-37, 5562-38), requiring a permit and bond for the operation of motor vehicles for hire in cities of the first class, it is held that liability on their bond for injuries received due to negligent operation is limited to injuries which occur within the city limits, in view of the dominant purpose of the act to regulate only operation in cities of the first class and to require no permits for cars operating outside of such limits. Bartlett v. Laphier (1917) 94 Wash. 354, 162 Pac. 533. But the Washington statute is not inapplicable to motor buses because they do not operate on fixed routes, or because they charge different rates of fare for different distances, or because they sometimes carry passengers across the boundary lines of the city. The prohibition is against carrying passengers within a city of the first class in the vehicles named, and is operative so long as the passenger is being carried therein in the prohibited vehicles, no matter over what route, for what fare, or to what destination. Puget Sound Traction, Light & Power Co. v. Grassmeyer, (1918),—Wash.—, 173 Pac. 504.

Where the bond requires a change of route to be consented to by the surety, the surety will not be liable for injuries caused by the bus while being driven off the prescribed route without its permission. Motor Car Indemnity Exchange v. Lilienthal, (1921),—Tex. Civ. App.—, 229 S. W. 703.

Deviations from the proscribed route may, however, be authorized by the ordinance under which the bus is operated. Bond v. Holloway, (1920),—Cal. App.—, 188 Pac. 577.

A passenger automobile is being operated "in the service of a common carrier" within the terms of a liability bond, as required by the Wisconsin statute, not merely while it is carry-

ing passengers on its route, but while it is running to a repair shop to receive the repairs necessary to enable it to continue its service as a common carrier. Ehlers v. Automobile Liability Co., (1919), 169 Wis. 494, 173 N. W. 325.

§156. **Liability for Lessee or Delegate Operating Bus.**— Under an ordinance requiring a jitney bus owner to give a bond, and, in effect, providing that if an owner's servant puts another man in his place without authority from the owner, the owner shall suffer for such substitute's negligence rather than the passengers and public, who have a right to assume that the car would not be intrusted to any one to carry on the business unless he was the employee of the owner, the owner and his surety were held liable for injuries to a pedestrian on a sidewalk, injured by the defective condition of the bus when operated by the driver for one who operated the car for the owner on a percentage basis, with a guarantee of $2.50 a day, where the ordinance requires operation on specified schedules under penalty of forfeiture of the owner's license, so that the operator on a percentage basis had to get somebody to relieve him at meal times. Western Indemnity Co. v. Berry, (1918),—Tex. Civ. App.—, 200 S. W. 245.

Under the Washington statute the surety is liable for injuries resulting from a machine for which the owner has secured the permit, though it is operated by a lessee. Any contract of the licensee tending to shift liability from himself and his bondsman and at the same time allow him to reap a benefit either in rental or a share of the profits must necessarily be construed as a device for evading the effect of the law. The permit and bond required by the statute cover a specific machine, and any contract which would defeat the statute would necessarily be void as against public policy. McDonald v. Lawrence, (1918), 100 Wash. 215, 170 Pac. 576.

The Washington courts hold that the surety's liability to one who has been injured does not depend upon whether the principals on the bond are owners of the bus. The suretyship

concerns the car and its operation and not its ownership. Horner v. Kilmer, (1921),—Wash.—, 196 Pac. 646.

§157. **Extent of Surety's Liability.**—Under the Washington statute the surety is liable to each person injured for the full amount of the damages, up to the extent of the penalty on the bond. Salo v. Seattle Taxicab & Transfer Co., (1917), 95 Wash. 109, 163 Pac. 384; Nelson v. Pacific Coast Casualty Co., (1917), 96 Wash. 43, 164 Pac. 594.

In Pennsylvania, however, it is held that a requirement that "the bond shall be a continuing liability, notwithstanding any recovery thereon," if taken to mean that while the bond purported to be in the penal sum of $2,500, yet after recovery to that amount, the obligors should continue to be liable for other and additional amounts without limit, was held to be clearly unreasonable, since no surety could properly be asked to undertake such an indefinite and unlimited responsibility. Jitney Bus Assn. of Wilkesbarre v. City of Wilkesbarre, (1917), 256 Pa. 462, 100 Atl. 954.

Where a bus operator filed two bonds, each in the sum required by the city ordinance, $1,000, it was held that the liability of the sureties was not restricted to $500 each, and in the event of a judgment for more than $2,000 against the operator, one surety was liable to the full amount of his bond, though the other surety had paid $900 in compromise of the claim against him. Western Indemnity Co. v. Murray 1919),—Tex. Civ. App.—, 208 S. W. 696. The court said: "The rule of contributon might apply as between appellant and the Maryland Casualty Company, if the amount of default had not been more than $1,000, but where, as in this case, there are two separate and distinct bonds, each supported by its own monthly payments of premium, the assured, the person injured, must be held to be entitled to recover upon both up to the amount of the bonds if the liability and default is that much."

Under the Rhode Island statute the liability of the sureties is unconditional, and they may be proceeded against alone,

where the bond is joint and several; and the right of action on the bond is not limited to passengers in the car of the licensee, but is also for the benefit of pedestrians or persons in automobiles other than that of the licensee. City of Providence v. Paine, (1918), 41 R. I. 333, 103 Atl. 786.

The California Supreme Court holds that a bond may be properly construed, though the obligation therein does not expressly run in favor of third persons, to include the requirements of an ordinance that it be so conditioned so that the surety company may be properly joined with the insured in an action for injuries by the operation of the bus. Milliron v. Dittman, (1919), —Cal.—, 181 Pac. 779. But in Calvitt v. Mayor, etc., of Savannah, (1919), —Ga. App.—, 101 S. E. 129, it is held that the surety is not a proper party to an action against the bus driver; and a judgment against the principal is not conclusive as to the liabilty of the surety, but only prima facie evidence thereof.

The New Jersey statute does not authorize the court to marshal the fund payable under the policy for division among those injured in an accident. The statute provides that before an injured person can have recourse to the policy he must recover final judgment aganst the bus owner; and until he has final judgment he has no lien on the policy. The statute merely proposes to give those who suffer injury through the bus owner a special fund from which to collect, in case the bus owner is financially unable to respond in damages. What the Legislature has said, in effect, is that the policy should be for the benefit of every person suffering loss, damage, or injury who may establish his claim by judgment against the bus owner and proceed to collect from the insurance company in accordance with the law respecting judgments and executions. Had it intended that the amount of the policy should be shared proportionately by all persons who, within the time fixed by the statute of limitations, might sue and recover judgment against the bus owner, it would have said so, or it would have provided that the policy should be for the benefit of every person injured, to the extent of $5,000 per person.

To hold that the policy is for the benefit of all injured persons pro rata would make it necessary for the insurance company to ascertain, before it could safely pay any one, how many persons might have claims thereon, whether growing out of one accident or several accidents occurring after the policy was written, and what the total amount of judgments which might be presented would be.

The situation under the statute is that every person injured by a licensed auto bus may be said to have an inchoate lien upon the insurance policy, which inchoate right can ripen into an actual lien only by the recovery of final judgment against the bus owner and service of notice of the judgment on the insurance company. In the absence of any statutory provision to the contrary, such liens have priority in the order in which they mature and are presented to the insurance company. Turk v. Goldberg, (1920), —N. J. Eq.—, 109 Atl. 732.

The bond under the Washington statute covers injuries to the property or business of passengers as well as injuries to their persons. Singer v. Martin, (1917), 96 Wash. 231, 164 Pac. 1105. The loss recoverable under the New Jersey statute is limited to such as results to a third party from bodily injury or death, and does not cover damages to an automobile. Gillard v. Manufacturers' Casualty Insurance Co., (1919),—N. J.—, 107 Atl. 448, reversing 92 N. J. L. 146, 104 Atl. 709.

Under the Washington statute parents may recover on the bond for the death of a minor child. Bruner v. Little (1917) 97 Wash. 319, 166 Pac. 1166.

Where the policy is limited to the particular car named therein, the insurer is not liable for an injury caused by a different car operated by the same owner. Downs v. Georgia Casualty Co., (1921), 271 Fed. 310. And failure to prove that the injury was caused by the automobile covered by the bond will bar recovery against the surety in an action on the bond. Motor Car Indemnity Exchange v. Lilienthal, (1921)—Tex. Civ. App.—, 229 S. W. 703.

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